No. 667

IN THE

Supreme Court of the United States

October Term, 1944

THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ET AL.

Petitioners

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF FOR PETITIONERS,
The Bay Counties District Council of Carpenters, *et al.*

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THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, MILLMEN'S UNION NO. 42, THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, MILLMEN'S UNION NO. 550, J. F. CAMBIANO, C. H. IRISH, W. P. KELLY, EMIL H. OVENBERG, W. L. WILCOX AND CHARLES ROE

Petitioners

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS

The Bay Counties District Council of Carpenters, *et al.*

I

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 144 F. 2d 546. The District Court did not render an opinion.

II

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is under Section 240 (a) of the Judicial Code, 28 U. S. C. sec. 347(a).

Federal Statutes involved are the Sherman Act, sec. 1, 15 U. S. C. 1, the Clayton Act, 15 U. S. C. 17, and 29 U. S. C. 52, and the Norris-LaGuardia Act, 29 U. S. C. 102 *et seq.**

III

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

These petitioners are local labor union organizations and individual officers or collective bargaining representatives thereof affiliated with the United Brotherhood of Carpenters and Joiners of America of the American Federation of Labor.

They were convicted of violating Section 1 of the Sherman Act after trial by jury upon an indictment charging them with having conspired and combined with employer defendants to restrain shipment in interstate commerce of millwork and patterned lumber into the San Francisco Bay Area, particularly from Washington and Oregon.

A second count of the indictment alleged that the defendants combined and conspired to monopolize within the same area a part of the trade and commerce in millwork and patterned lumber among the several states in violation of 15 U. S. C., Section 2. This count was dismissed at the request of the Government at the beginning of the trial (R. 139).

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* Pertinent provisions of these statutes are quoted in Appendix, page 75 *et seq.*

One employer group affiliated with Lumber Products Association, Inc. pleaded *nolo contendere* (R. 106-109). Defendants in the other employer group affiliated with Commercial Fixture and Store Front Institute were tried and convicted with the union defendants and did not prosecute an appeal (R. 138).

The judgment of the Circuit Court of Appeals under review affirmed the judgments of conviction as to these petitioners and the defendants United Brotherhood of Carpenters and Joiners of America and Alameda County Building and Construction Trades Council. The latter two defendants are before this Court through separate petitions for certiorari. It also affirmed the judgments based upon the *nolo contendere* pleas of the Lumber Products Association employer group. The Circuit Court reversed as to three union officers or business agents who were held to be immunized from prosecution by reason of having been compelled to testify before the grand jury which returned the indictment concerning the transactions, matters and things upon which the indictment was found. The Government did not seek review of this portion of the judgment of the Circuit Court which is now final (144 F. 2d 546, 555).

The questions involved, stated generally, relate to the position of a trade union under the Sherman Law, as affected by the Clayton and Norris-LaGuardia Acts. They arise upon the sufficiency of the indictment and proof to show a violation of the Sherman Act, and upon the instructions and refusals to instruct and evidentiary rulings which in effect denied application of the latter two statutes as a matter of law.

The questions are more specifically stated in our petition for certiorari as follows:

1. Is an agreement arrived at through the process of collective bargaining between unions and employers engaged in a local industry that "* * * no material will

be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors, that do not conform to the rates of wage and working conditions of this agreement" illegal per se under the Sherman Anti-trust Law if enforced by peaceful, conventional union methods against material in interstate commerce?

2. Would it be a defense for the unions that such agreement settled a labor dispute involving the union demand for a closed shop as to men and materials?

3. Would it be a defense for the unions to show that the direct and primary purpose of the demand for a closed shop was to unionize all local plants in the industry with the ultimate objective of better wages and improved working conditions?

4. Where a union does combine with non-labor groups through a collective bargaining agreement covering terms and conditions of employment, should the end, objective or purpose of the union be considered where an illegal restraint of interstate trade is claimed to have been intended or to have resulted from peaceful enforcement of the agreement?

5. Was the jury properly instructed that the "sole question is whether defendants intended to or did restrain the shipment of millwork and patterned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants" (R. 1554)?

6. Was the jury properly instructed that it would constitute no defense under the law, either to employer defendants or labor union defendants, that such agreement was arrived at in settlement of a labor dispute; or that the motive of the labor union defendants was to promote their self-interest (R. 1534-1537, 1552, 1553)?

7. Was the jury properly instructed that it should not consider whether the millwork and patterned lumber involved in the testimony in the case was union and bore a union label (R. 1554)?

8. Was the jury properly instructed that defendant union organizations, being unincorporated associations, were responsible for the act of an agent which the agent assumed to do for the union while performing duties actually delegated to him (R. 1530)?

9. Was it error not to give a requested instruction to the effect that an officer of a union is not authorized merely by virtue of his office to make his union a party to an unlawful conspiracy, but that to bind a union it is necessary to find that the union participated in, or actually authorized the act, or ratified it after actual knowledge (R. 1532, 1533)?

10. Was it error not to give a requested instruction to the effect that no individual defendant who was an officer or member of a union should be convicted for an unlawful act, if any, of another officer or member of the union, except upon clear proof that such individual defendant actually participated in or actually authorized such act, or ratified it after actual knowledge thereof (R. 1533)?

11. Where the Government charged that an agreement between employers and employees was made and enforced with the objective of destroying competition of material in interstate commerce and was allowed to prove picketing or refusals to work upon material originating outside the state, should the defendants have been permitted to show that such material was non-union or produced under sub-standard labor conditions?

12. Where the Government was allowed to prove as overt acts under the alleged conspiracy the picketing and advertising of material as unfair, should the union defendants have been allowed to show the material was C. I. O. and that they were acting in connection with an industrial war and labor dispute with such rival union, arising from the counter trade movement of the latter to unionize the industry both in California and in the Northwest?

IV

SPECIFICATION OF THE ASSIGNED ERRORS TO BE URGED

The trial was long and the evidence extensive. Rulings adverse to petitioners were numerous. As a consequence, many assignments of error have been made, but they fall into groups in relation to the questions before stated (R. 1441). Mindful of the desirability of minimizing those to be urged in order to focus attention upon the principal points, but with the desire to present the basic questions in all of their proper aspects, we specify the following assignments of error to be relied upon:

Numbers 1, R. 1442; 2, R. 1443; 4, R. 1443; 55, R. 1534; 56, R. 1537; 76, R. 1552; 77, R. 1554; 54, R. 1533; 50, R. 1529; 51, R. 1532; 52, R. 1532; 53, R. 1533; 84, R. 1558; 88, R. 1561; 89, R. 1562; 74, R. 1551; 75, R. 1552; 112, R. 1574; 81, R. 1556; 97, R. 1566; 30, R. 1483; 14, R. 1457; 39, R. 1499; 40, R. 1499; 15, R. 1457; 41, R. 1501; 42, R. 1504; 13, R. 1456; 12, R. 1456; 36, R. 1497; 20, R. 1469; 31, R. 1485; 26, R. 1481; 25, R. 1474.

V

ARGUMENT OF THE CASE

POINT I

The conduct involved is immunized from being a violation of the Sherman Act by the Clayton and Norris-LaGuardia Acts. It was also lawful under the rule of reason.

In view of the number of separate briefs to the filed covering the same points, and in the interest of brevity we are combining the argument directed to the sufficiency of the indictment and the evidence. It is based upon the following assignments of error.

The Court erred in overruling the demurrer of these appellants to the indictment in that the indictment fails to state facts constituting a public offense against these appellants or any of them.

(Assignment No. 1, R. 1442.)

The Court erred in denying the motions of these appellants to dismiss based upon the insufficiency of the indictment to state an offense.

(Assignment No. 2, R. 1443.)

The Court erred because of the insufficiency of the evidence in denying the motions of these appellants made at the conclusion of the plaintiff's case, and repeated at the close of the case, to dismiss or for a directed verdict of acquittal, and made upon the grounds:

That there was insufficient evidence to show a violation of the Sherman Act (26 Stat. 209) by these appellants, or any of them; and

that the evidence affirmatively showed the appellants were acting in connection with or as a result of a labor dispute, and any acts shown in the evidence were immunized by the Clayton Act (38 Stat. 730, sec. 6-20) and the Norris-LaGuardia Act (47 Stat. 29); and

that plaintiff failed to prove the allegations of paragraph 29 of the indictment referring to the lack of a labor dispute and that the unions were not carrying on legitimate objectives of labor; and

that as to each appellant there was a lack of any clear proof that he or it participated in, authorized or ratified any unlawful act; and

that there was no proof of an unlawful intent on the part of any appellant.

(Assignment 4, R. 1443.)

A. Summary of the Indictment.

Epitomizing the contents of the indictment (R. 4) we find that Section I specifies the period of time covered by the acts charged; Section II defines certain terms employed; Section III describes the nature and volume of interstate commerce involved and alleges a decrease in the interstate shipment of such commerce consisting of millwork and patterned lumber since the formation of the alleged conspiracy and combination; Section IV names the employer and labor defendants and sets forth their respective affiliations; and Section V alleges that the employer defendants control substantially all of the millwork and patterned lumber manufactured in the San Francisco Bay area and that they employ only members of the defendant union organizations with whom are affiliated all laborers skilled in such manufacture. To this point the indictment is purely introduction, inducement and background. Neither such material nor any opprobrium by which it is characterized by the pleader can constitute the offense sought to be charged.

We come then to the accusatory portion of the indictment in Section VI (R. 26) where it is alleged the defendants have engaged in a combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce in millwork and patterned lumber to restrict shipments into the San Francisco Bay area and raise and maintain prices of such millwork and patterned lumber. After the foregoing generalities and conclusions we finally reach the legal kernel in the charge that to effectuate such conspiracy defendant employers acceded to wage scale demands of defendant unions, in return for which defendant unions agreed to and have engaged in activities preventing the sale and shipment of millwork and patterned lumber into the San Francisco Bay area by manufacturers outside of California. That pursuant to said agreement defendants on or about September 21, 1936, entered into an agreement covering the wages to be paid members of defendant unions, in which agreement it was agreed that "* * * no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement"; that defendants have continued such provisions in force by subsequent agreements.

Overt acts to enforce such provisions are then enumerated, that defendants have maintained a joint conference board, circulated price lists, interchanged information relative to interstate shipments of patterned lumber and millwork, and prevented interstate shipments by pickets and threats to picket.

Finally there are purely conclusory averments to the effect that in joining and carrying out the conspiracy, defendant unions were not carrying out objectives of labor or acting in a labor dispute, but solely to restrain interstate trade and maintain prices.

B. Summary of the Evidence

The case grew out of a trade movement which began about 1935 to overcome the open shop existing in the San Francisco Bay area since about 1920 and to unionize the industry in that locality (R. 605, 803, 812-814).

In 1935 Local Union No. 42 (San Francisco) obtained an agreement with the employers. In 1936 the agreement containing the so-called restrictive clause was negotiated.

The evidence shows without conflict that such restrictive clause was not included at the instance of defendant manufacturers but of defendant unions; that the exempt list made a part of the restrictive clause was added at the insistence of the employers and over the objection of the unions as a qualification of the latter's complete closed shop demand. The language was patterned upon previous contract forms used by various members of the San Francisco Building Trades Council since 1903 (R. 760-762). The motive of the union in seeking a closed shop was to achieve its normal objective to create jobs for the union members, standardize wages and obtain a proper wage scale. In the policy of the closed shop lies the union's answer to the employers' argument that they could not pay a proper scale because of the competition of low wage scale material. Such policy is the very foundation for unionization of an industry. The primary purpose of the unions was to meet a local situation. The employers were going around the corner and buying non-union material and causing the men to work on it. The union stamp would thus be acquired for the finished product contrary to closed shop principles. This defeated organization efforts directed primarily toward all of the local shops. At the same time the employers claimed the union was violating its own principles by allowing its union members to work under non-union conditions at a wage scale less than established in 1935. The result was paragraphs 16 and 17 of the 1936 agreement (R. p. 283), claimed by the Government to be the *modus*

operandi of the conspiracy (direct examination of J. G. Ennes, R. pp. 608 to 612; cross-examination of J. G. Ennes, R. pp. 648 to 657; redirect examination of J. G. Ennes, R. pp. 665, 666; direct examination of John Mullen, R. pp. 740, 741; direct examination of William P. Kelly, R. pp. 759 to 765; cross-examination of William P. Kelly, R. pp. 792, 797 to 799, 802, 803; direct examination of Emil H. Ovenberg, R. pp. 815, 816; direct examination of David H. Ryan, R. pp. 829 to 833; cross-examination of David H. Ryan, R. pp. 887 to 894).

The wage scale of eighty-two and one-half (82½¢) cents and ninety-two and one-half (92½¢) cents per hour established by the agreement of September 21, 1936, was in no sense fixed by the defendant manufacturers acceding to the wage scale demands of defendant unions. It represented a compromise reached only after the dispute had been carried to the point of an arbitration agreement to fix the scale. The union demands were: 1, a closed shop for Alameda County; 2, a forty (40) hour week, and 3, minimum wage scale of $1.12½ an hour. After the union shop and matter of hours had been agreed upon, the employers' proposition of 80 cents and 90 cents for millmen in San Francisco and Alameda was rejected—the vote of Local 42 (San Francisco) being 229 against to none favoring the offer. After the matter had been carried to the point of selecting arbitrators to determine the scale the proposal of the millmen and cabinet manufacturers was accepted by the combined votes of Local 42 (San Francisco) and 550 (Alameda), but only after being denounced in the meeting of Local 42 as a wage proportionate to truck drivers and not suitable to skilled mechanics and the vote of Local 42 was 242 against and 90 for accepting the proposal. The agreement was approved by majority vote of the two locals only because of the overwhelmingly favorable vote of Local 550, Alameda County having been almost totally unorganized until gaining closed shop provisions under this 1936 agreement (R. pp.

1018 to 1023; direct examination of Emil H. Ovenberg, R. pp. 813; 814; R. pp. 426, 427; direct examination of William P. Kelly, R. p. 759).

The agreement of 1938 which carried forward similar so-called restrictive clauses in slightly different form contained a wage scale fixed by arbitration, Judge Walter Perry Johnson, a retired state court Judge, having acted as the impartial arbitrator. It is therefore obvious that in neither agreement did the scale result from an accession by the employers to union demands in exchange for restrictive activities against interstate commerce (direct examination of J. G. Ennes, R. pp. 614 to 617; R. pp. 768 to 770).

In 1938 the demand of the millmen's unions was for the same rate as received by the carpenters (R. p. 782). The arbitration award was for $9.00 per day (direct examination of J. G. Ennes, R. pp. 620, 621). A group of Alameda employers claimed they were not bound by the award and declined to increase the scale from $8.00 (direct examination of William P. Kelly, R. pp. 771 to 774). The ultimate result was the 1938 agreement providing for a scale of $8.50, but making it uniform for six counties, namely, San Francisco, Alameda, Contra Costa, Marin, San Mateo and Santa Clara. Local 42 (San Francisco) was prevailed upon to accept a 50 cents reduction from the award in order to get a uniform agreement for the six counties (direct examination of William P. Kelly, R. pp. 771 to 774; direct examination of David H. Ryan, R. pp. 834 to 839; direct examination of Joseph F. Cambiano, R. pp. 1034, 1035).

The difference in language between the so-called restrictive clauses as contained in paragraph 16 of the 1936 agreement (Exhibit 131, R. p. 283) and paragraph 17 of the 1938 contract (Exhibit 132, R. p. 289) as modified (Exhibit 123-8, R. p. 561), arose in this manner. In 1936 a counter trade movement in the mill and building industry promulgated by the C.I.O. became active in the North-

west and on the Pacific Coast. This engaged the activities of the United Brotherhood of Carpenters and Joiners of America and in the fight to combat it led to the establishment by the latter in the Northwest of certain non-beneficial local unions (direct examination of Emil H. Ovenberg, R. pp. 817, 818). This term then designated local unions who were not entitled to full membership status because of their low wage scale. Because of this they were not entitled to the use of the brotherhood stamp (cross-examination of William P. Kelly, R. p. 779). During the currency of the 1936 contract agitation arose among certain of the members of defendant local unions to carry out a policy of refusing to handle or work on the materials produced by such non-beneficial locals even though entitled to the stamp, because of the disparity in labor conditions under which it was manufactured. This internal question of union policy was determined by a ruling of the United Brotherhood of Carpenters and Joiners of America that any material bearing its stamp must not be discriminated against regardless of the working conditions under which it was produced (direct examination of Walter C. O'Leary, R. p. 982). When the proposed provisions of the 1938 contract came to the attention of William L. Hutcheson, president of the United Brotherhood, he became concerned that they might be construed as contrary in intent to the requirement that the stamp be invariably recognized. The resultant changes were to clarify the agreement as to this intent (cross-examination of David H. Ryan, R. pp. 896 to 901).

In the activities of the union defendants ascribed by the Government to be in furtherance of the restraints by enforcement of the restrictive clauses of the agreements, there is no suggestion of violence or other unlawfulness of method. Nor is there the slightest indication of profit to a union representative for wrongful use of his office. In

connection with the evidence we also call attention to the fact that although the indictment alleged the circulation of price lists and price fixing as an overt act (R. pp. 31, 32) there was not an iota of evidence produced to support such charge. These are, of course, negative affirmations as to the state of the record and we invite the Government to point out anything to the contrary.

C. The Law

(a) Application of the Clayton and Norris-LaGuardia Acts.

It is now established that

> "* * *, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and Sec. 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."
>
> *U. S.* v. *Hutcheson*, 312 U. S. 219, 231 (1941).

Pertinent portions of those statutes are set forth in the Appendix, pp. 75-80.

It is, of course, essential to evaluate the force of these controlling statutes in the light of the cases. We feel it unnecessary at this point, however, to retrace the line of Supreme Court decisions beyond *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), because of the landmark this opinion affords in its review of the history of the Sherman Act, particularly in its application to labor cases.

This Court held that apart from the immunity of the Clayton Act (violence was present) a sit-down strike and plant seizure were not restraints within the Sherman Act. The following significant conclusions with direct bearing on the instant case can be summarized as follows:

While labor unions are to some extent and in some

circumstances subject to the Act, it does not apply to all labor union activities affecting interstate commerce. The Act is to be interpreted in the light of its legislative history and the particular evils at which it was aimed.

Such history and the decisions interpreting the Act show it was not aimed at policing interstate movement of goods. It was designed to prevent restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market.

Restraints at which the Sherman Law is aimed are only those which are comparable to restraints deemed illegal at common law—those which are unreasonable or undue. Restraints upon competition or on the course of trade are not enough unless shown to have or be intended to have an effect upon prices or otherwise deprive purchasers of the advantage of free competition.

U. S. v. *Brims*, 272 U. S. 549 and *Local 167* v. *U. S.*, 291 U. S. 293, are cases of a labor organization being used by combinations of those engaged in an industry as the means for suppressing competition or fixing prices.

Successful union activity such as consummation of a wage agreement with employers may influence price competition by eliminating such part as is based upon difference in labor standards. But the elimination of price competition based on differences in labor standards is the objective of any national labor organization and this effect is not the kind of curtailment of price competition prohibited by the Sherman Act. Federal legislation aimed at eliminating competition based upon labor conditions regarded as substandard, through industry wide standards by collective bargaining, and legislation setting up minimum wage and hour standards supports the conclusion Congress does not regard effects upon competition from such combinations and standards against public policy or condemned by the Sherman Act.

Duplex Co. v. *Deering*, 254 U. S. 443, which condemned a secondary boycott and *Bedford Co.* v. *Journeymen Stone Cutter's Assn.*, 274 U. S. 37, involving a refusal of a union to work on a non-union product in the hands of a purchaser held that nothing in the Clayton Act legalized such activities but applicability of the rule of reason to restraints upon commerce affected by a labor union in order to promote and consolidate the interests of its union was not considered by those cases.

Other references will be made to this instructive opinion as the text is pertinent to the discussion.

We return then to the *Hutcheson* case, *supra*, where by the language hereinbefore quoted therefrom this Court gave efficacy to the Clayton Act and Norris-LaGuardia Act and granted their full impact upon the Sherman Act. At this point it is noteworthy that the *Bedford Stone* and *Duplex Printing Press Co.* cases were expressly rejected by the Court in the following language (p. 236):

> "The Norris-LaGuardia Act was a disapproval of Duplex Printing Press Co. v. Deering, supra, and Bedford Cut Stone Co. v. Journeymen Stone Cutters Association, 274 U. S. 37, as the authoritative interpretation of Sec. 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all such allowable conduct from the taint of being a 'violation of any law of the United States', including the Sherman Law."

Following the *Hutcheson* decision come three cases, *U. S.* v. *Building and Construction Trades Council of New Orleans*, 313 U. S. 539; *U. S.* v. *United Brotherhood of Carpenters and Joiners of America*, 313 U. S. 539, and *U. S.* v. *International Hod Carriers*, 313 U. S. 539 (1941), where this Court in *Per Curiam* decisions on motions to

dismiss, upon the authority of *U. S. v. Hutcheson*, affirmed rulings of District Courts which sustained demurrers to indictments.

The decision of the District Court in the *Hod Carriers* case is reported in *U. S. v. Carrozzo*, 37 F. S. 191 (Dist. Ct. Ill.—1941). It is important to observe that the facts showed working agreements between the union and contractors involved in the alleged restraint, whereby the contractors using truck mixers were required to employ the same number of men they would normally employ without the use of the cement mixers. This agreement obviously was of such nature as not to promote any purpose or objective of the employers—but does clearly indicate that the existence of an agreement or combination between employer and employee which effectuates a restraint of trade does not in and of itself bring a union within the interdict of the Sherman Act. It necessarily follows that the end sought by the union activities is material in judging if a violation exists.

In *United States* v. *American Federation of Musicians*, 47 F. Supp. 304 (N. D. Ill.—1942), affirmed *Per Curiam* decision reported in 318 U. S. 741, the District Judge said (p. 309):

> "The third contention of the Government deserves only a word. Here the employees seek only a contract with their employers for a 'closed shop' (in a sense large enough to include a shop which excludes not only non-union workers but also machines) and they seek this contract primarily for their (the servants') benefit and not for the benefit of a non-labor group. In the Court's opinion United States *v.* Brims, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403, and like cases, are not pertinent here."

After divergent rulings in the lower Courts upon the application of the law in cases involving labor and non-

labor groups,[1] we reach the culmination of the different viewpoints in the instant case and the case of *Allen Bradley Co. v. Local Union No. 3, Etc.*, 145 F. 2d 215 (CCA 2—1944).

It would serve no useful purpose to paraphrase the exhaustive treatment of the subject contained in the majority opinion in the latter case, or duplicate the copious references to authorities.

The essential factual predicate for the Court's decision in the *Allen Bradley* case was the determination that the union was not acting wantonly, corruptly, or even benevolently for the benefit of the employers but only in what was conceived to be the self-interest of the union. Certainly under reasonable interpretation and fair intendment the record in the instant case can support no different conclusion.

In this connection, we point out that the recitation of facts contained in the decision of the Circuit Court under review is based entirely upon the allegations of the indictment. The indictment charged that the employer group acceded to union wage demands in exchange for an agreement to prevent the sale and shipment to the San Francisco Bay area of products manufactured outside of California. The evidence shows to the contrary that the so-called restrictive clauses emanated from the unions to promote their trade movement for unionization and an increase and standardization of wages. The opinion of the Circuit Court stresses the charge of price fixing and circulation of price lists. There was an entire absence

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[1] See, for example, *Truck Drivers' Local* v. *U. S.*, 128 F. 2d 227 (C. C. A. 8); *Albrecht* v. *Kinsella*, 119 F. 2d 1003 (C. C. A. 7); *Gundersheimer's Inc.* v. *Bakery—Confectionery Workers*, 119 F. 2d 205 (App. D. C.); *U. S.* v. *Goedde and Co.*, 40 F. Supp. 523 (E. D. Ill.); *U. S.* v. *Central Supply Assn.*, 40 F. Supp. 964 (N. D. Ohio); *U. S.* v. *Associated Plumbing and Heating Merchants*, 38 F. Supp. 769 (N. D. Wash.); and *U. S.* v. *Bay Area Painters and Decorators Joint Com.*, 49 F. Supp. 733 (N. D. Cal.).

of proof of such. The indictment is characterized as charging a combination for a direct restraint upon commerce with an objective of destroying competition. From the evidence it clearly appears that the agreement, claimed to effect an illegal restraint, settled a labor dispute whereby the unions gained for their own end the very demands now said to constitute the agency for restraint.

In the *Allen Bradley* case, Justice Swan's dissent states agreement with his colleagues that the injunction was too broad, but indicates a belief that a combination of employers and employees cannot exclude articles from a local market because manufactured outside the state. Applying the rationale of this view to the facts of the instant case, it is to be observed that the so-called restrictive clauses were in no sense geographical. They applied solely to sub-standard material gauged by the working conditions of the agreement.

It is respectfully urged that the fundamental fallacy in the judgment of the Circuit Court of Appeals under review herein is centered in this excerpt from the opinion:

> "Here the Manufacturer Group and the Union Group are no longer 'participating or interested in a labor dispute' as that term is used in Section 5 of the Norris-LaGuardia Act. The dispute is past. The labor and non-labor groups are combined. The acts described in Section 4 of that Act and Section 20 of the Clayton Act, some of which are charged in the indictment here to have been committed by the now non-disputant unions and their members and their manufacturing employers are not to secure any legitimate advance of the laborer's interest. * * *"

It is interesting to note that Judge St. Sure, the trial Judge in the instant case, has recanted from the extremity of such a view, as indicated by the following quotations from his decision in *U. S.* v. *Bay Area Painters and Decorators Joint Com.*, 49 F. Supp. 733 (1943):

> "Part of the stated policy of the Norris-LaGuardia Act is to enable the worker to appoint representatives

to negotiate the terms and conditions of his employment, and to free him from certain restraints on activities for the purpose of collective bargaining. So long as these activities fall within the provisions of the Clayton and Norris-LaGuardia Acts, the unions are exempt from prosecution under the Sherman Law.

"The unions must necessarily 'negotiate' and 'bargain collectively' with the employers. It would seem beyond belief that Congress intended to protect the machinery used by labor to enable it to negotiate and bargain collectively for terms and conditions of employment and then, after it completes its negotiations and has made its bargain through agreement with the employers, to withdraw that protection and leave the parties to the agreement liable for prosecution for criminal conspiracy. Such a construction would vitiate the effect of the Clayton and Norris-LaGuardia Acts, for such agreements almost always have some effect on interstate commerce, if only to raise prices by increase in wages or decrease in hours of work.

"In United States *v.* Hutcheson, *supra*, the Supreme Court said: 'If the facts laid in the indictment come within the conduct enumerated in sec. 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States." So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.'

"From this language it is reasonable to infer that where a union does combine with non-labor groups the end to which its activities have been the means should be considered."

It is axiomat that if labor can lawfully demand a closed shop as to men or materials then the employers can

lawfully agree to that demand. *Gundersheimers' Inc.* v. *Bakery-Confectionery Workers*, 119 F. 2d 205 (App. D. C. —1941); *U. S.* v. *Carrozzo*, 313 U. S. 539.

The nature of the alleged restraint in *United States* v. *B. Goedde and Co.*, 40 F. Supp. 523 (Dist. Ct. Ill.—1941), bears striking similarity in many respects to that set forth in the indictment in the instant case. There it was charged that employers and employees restrained trade in millwork and other lumber products with intent to affect prices and free competition, through contracts providing for a closed shop, the use of the union label and exclusion of unlabeled material; that the unions warned they would not use unlabeled material and forced removal of such from jobs and by coercion through strikes and threats to strike forced the use of labeled material. In addition there were charges of refusal to work on material manufactured in other states and enforced use of the label by violence and threats of violence. With reference to the type of activities charged in the instant case, Judge Lindley, who calls attention in his opinion to the fact that he was trial judge in the cases of *United States* v. *Painters' Dist. Council*, 44 F. (2d) 58, and *Boyle* v. *United States*, 40 F. (2d) 49, said in part as follows:

> "While Mr. Justice Frankfurter does not in so many words disapprove such earlier cases, he does announce that the Norris-LaGuardia Act was passed in an attempt to limit the invalidity of acts of labor unions to the extent that the same had previously existed. He declares that the allowable area of union activity was not to be restrained as it had been in Duplex Printing Press Co. v. Deering, et al., 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196, and the trial courts are instructed by the opinion that whether trade union activities constitute a violation of the Sherman Act is to be determined only by reading it in connection with the Clayton and the Norris-LaGuardia Acts 'as a harmonizing text of outlawry of labor conduct.' (312 U. S. 219, 61 S. Ct. 466, 85 L. Ed.

788.) In other words, if the acts said by the indictment to violate the Anti-Trust Act are legally permissible under the Clayton and Norris-LaGuardia Acts, they do not constitute such a violation. As to such allowable acts, immunity from prosecution exists. It would seem to follow that many of the decisions preceding the Norris-LaGuardia Act are now very largely modified and limited in their effect. Our new yardstick of validity is to be found not in them but in this, the most recent decision of the Supreme Court.

Prior to the passage of the Norris-LaGuardia Act, in 1926, the Supreme Court decided United States v. Brims, 272 U. S. 549, 47 S. Ct. 169, 170, 71 L. Ed. 403, and, in the absence of United States v. Hutcheson, that decision would control here. * * *"

"* * * In United States v. Hutcheson, supra, Mr. Justice Frankfurter said that, so long as a union acts in its self interest and does not combine with 'non-labor groups,' 'the licit and the illicit under Sec. 20' of the Clayton Act 'are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' In his footnote, he cited for comparison United States v. Brims, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403. He did not say that that decision was overruled; nor did he say explicitly that if unions combined with nonunion groups, their acts would be immune. I take it that, by the language used, he held in effect that the doctrine of such cases as United States v. Brims, supra, must be modified to this extent, that if the acts or agreements of unions with third persons do not include anything other than the acts legalized by the Clayton and Norris-LaGuardia Acts, then they will not support an indictment; but that to the extent that the acts complained of go beyond the conduct of unions legalized by the same acts, they may be the basis of a valid indictment under the Sherman Act.

In following the prescribed test, let us see which of the alleged means employed and acts of labor unions are exempted from criminal prosecution under the Clayton Act. In the analysis hereinbefore set forth

the acts mentioned under 1 (a) and (b) (Paragraph 48 of the indictment), relating to contracts for closed shops and use of the label are clearly within the legitimate activities of unions as contemplated by the Clayton Act. Under 2(a) (b) (c) and (d) (Paragraph 49), it is alleged that the unions warned builders that they would not work with unlabeled materials; warned purchasers that such material would have to be removed and returned to the manufacturer and forced the makers of such material to remove the same from the job and return it to the plants. It would seem obvious that these acts are likewise granted immunity by the Clayton Act. Under 3 (Paragraph 50) we have alleged intimidation of builders by strikes and threats to strike, thereby forcing them to buy union labeled material, although similar products could be purchased at lower prices in other states. This too is exempt within the language of the Clayton Act. The resulting effect upon interstate commerce is purely incidental, United States v. Hutcheson, 312 U. S. 219, at page 241, 61 S. Ct. 463, 85 L. Ed. 788. Each of the acts thus far mentioned apparently is, by the Clayton Act, recognized as a legal economic weapon of labor unions."

(a) Our basic position on the sufficiency of the indictment and the evidence is premised upon three contentions:

(1) The so-called restrictive clauses obviously involved and grew out of labor disputes.

They emanated from the union to effectuate a closed shop as to men and materials and to gain the ultimate end of higher wages and better working conditions. They were the very medium through which the demands were settled.

Norris-La Guardia Act, *supra*, secs. 101, 103;
Milk Wagon Drivers v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940).

(2) The labor objectives were lawful.

A closed shop agreement is unquestionably legal (National Labor Relations Act, 29 U. S. C., sec. 151), and the elimination of competition from non-union or sub-standard goods is a normal objective of any national trade union. Such is an inherent part of the struggle for jobs and a living wage measured by the standards and requirements of the place where the labor is performed. These things are of the very essence of any union's self-interest and ultimate ends.

Apex Hosiery v. *Leader* (*supra*);
Amer. Steel Foundries v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921).

(3) Every act by which the restraint is claimed to have been accomplished was lawful.

There is no suggestion of violence or other malfeasance. An agreement not to work is unquestionably legal.

Norris-La Guardia Act, Section 104.

Picketing is a conventional means of pursuing union objectives.

Thornhill v. *Alabama*, 310 U. S. 88 (1940).

Threat to do a lawful act attaches no stigma of crime.

McKay and Allied Cases, 16 Cal. 2d 311, *et seq.* (1940).

A strike or threat of strike is of course in the same category.

Levering v. *Morrin*, 289 U. S. 103 (1933).

(b) The Rule of Reason

Irrespective of the Clayton and Norris-LaGuardia Acts, there is no showing of an unreasonable restraint upon commerce. The charge of making and carrying out an agreement not to handle or work upon material manufactured under a lesser wage scale clearly shows intrastate transactions, the effect of which would be to impose an indirect restraint, if any. Cf. *Industrial Assn.* v. *U. S.*, 268 U. S. 64 (1925), where the restraint arose in the construction industry from an attempt to enforce an open shop in San Francisco—in the instant case from an effort to establish a closed shop.

The gaining of a wage scale demand is a proper objective and an agreement not to work on material produced under lower standards of labor is a lawful and proper means. In fact the enactments of Congress indicate that an agreement of such nature is not only legal—but is designed to stimulate rather than impede interstate commerce through the standardization of working conditions in an industry and consequent elimination of industrial strife. See in this connection *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), which held unconstitutional the "Bituminous Coal Conservation Act of 1935", 49 Stat. 991. Consider also the policy of the statutes referred to in the *Apex* case (*supra*), namely, The National Labor Relations Act, The Public Contracts Act and The Fair Labor Standards Act of 1938. It might be also noted in passing that we had further evidence of the Congressional intent in the National Industrial Recovery Act, 15 U. S. C. Sec. 701, *et seq.*, designed to eliminate cutthroat competition which serves to depress prices and act as a breeding ground for unfair labor practices.

We have seen that the *Duplex Printing Co.* and *Bedford Stone* cases have been rejected for their failure to give proper scope and effect to the Clayton Act. But on the point under discussion the following language in the *Apex* case (*supra*, at p. 506), is equally significant:

"It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases. See Montague & Co. *v.* Lowry, 193 U. S. 38, 45, 46; Retail Lumber Dealers Co. *v.* United States, supra; Paramount Famous Lasky Co. *v.* United States, 282 U. S. 30; United States *v.* First National Pictures, 282 U. S. 44. That the objective of the restraint in the boycott cases was the strengthening of the bargaining position of the union and not the elimination of business competition—which was the end in the non-labor cases—was thought to be immaterial because the Court viewed the restraint itself, in contrast to the interference with shipments caused by a local factory strike, to be of a kind regarded as offensive at common law because of its effect in curtailing a free market and it was held to offend against the Sherman Act because it effected and was aimed at suppression of competition with union made goods in the interstate market.

"Both the Duplex Printing Co. and Bedford Stone cases followed the enactment of the Clayton Act and the recognition of the 'rule of reason' in the Standard Oil case, supra. The applicability of that rule to restraints upon commerce affected by a labor union in order to promote and consolidate the interests of its union was not considered.[25]"

To return then to the debated language of Mr. Justice Frankfurter in the *Hutcheson* case (*supra*) if a proper interpretation is that where a union acts in combination with a non-labor group we do distinguish the licit and illicit by judging the wisdom or unwisdom, the rightness or wrongness or selfishness or unselfishness—*i. e.*, the reasonableness of the restraint—by the end of which the activities are the means—then the agreement not to work on goods which are substandard according to the working conditions established by the contract—clearly meets

the test of reasonableness and lawfulness of end or objective. Limiting the objective to the sole one stated in the indictment—that of wages, the struggle for a living wage—measured in living requirements of San Francisco—must necessarily be fought in a nation-wide arena. The products of sweat shop labor do not lose their competitive effect at city, county or state lines. In this connection the indictment expressly recognizes the existence of mass production machines and lower wages in the Northwest (R. 7). The national policy as declared legislatively and enunciated by this Court is that wage cutting is not the type of competition which the Sherman Act is designed to force upon labor. On the contrary unbridled competition coming from low wage manufacturers inevitably crushes competition maintaining fair labor standards; ultimately leading to the most vicious monopoly. In the process it also impedes free trade and commerce by the attending industrial strife which inevitably arises.

The conclusion therefore appears to us inevitable that what is charged or proven here is not an unreasonable restraint of commerce—but the accomplishment of a legal end by lawful means, and the indictment and evidence are insufficient in law.

POINT II

Errors in the charge to the jury and evidentiary rulings go to the very heart of the convictions and require reversal.

A. *Instructions to the Jury*

(A-1) The Court erred in instructing the jury, as follows:

> "If you find that the employer and labor union defendants entered into an agreement or understanding, oral or written, under the terms of which the employer defendants agreed not to purchase patterned lumber and millwork manufactured under a lower wage scale than that prevailing in the San Francisco Bay Area, including patterned lumber and millwork manufactured in States outside the State of California; or if you find that the employer and labor union defendants entered into an agreement or understanding, oral or written, under the terms of which the employer defendants agreed not to purchase and the labor union defendants agreed not to work on any patterned lumber or millwork manufactured under conditions unfair to the employer defendants including patterned lumber and millwork manufactured outside the State of California; such an agreement or understanding would constitute a violation of the Sherman Act as charged in the indictment. It would constitute no defense under the law, either to the employer defendants or to the labor union defendants that the agreement or understanding may have been arrived at in settlement of a labor dispute; and it would likewise constitute no defense under the law that any such agreement or understanding may have been arrived at as the result of proceedings in arbitration of such a dispute,"

To which defendants excepted, as follows:

"We except to the charge that where we find an employer and a labor union defendant agreeing not to purchase lumber under different wage scales and affecting out of state lumber, or where they agree not to work on such material or lumber that is unfair to the employer, that such is a violation in and of itself of the Sherman Act; that there is no defense here by reason of the fact that any contract or agreement or understanding was arrived at in settlement of a labor dispute. The charge that the existence or non-existence of a labor dispute here is immaterial, that is no defense that any contract was as a result of a proceeding, for arbitration of a labor dispute, or as a result of such arbitration," * * * and, "I also wish to except to that portion of your Honor's charge dealing with the matter of the lower wage scale not being a matter of defense, but in effect being a substantial ground for conviction. And to that portion of the charge to the effect that conditions unfair to the employers would not execute the actions here and would in effect, standing alone, constitute a violation of the statute. Further, in that connection, with respect to the fact that in the arrival at the agreement there was no defense, rather, that the agreement was arrived at in settlement of a labor dispute, or in the arbitration of such a dispute being deemed by your Honor not to be a defense."

(Assignment 55, R. 1534.)

This and the next five assignments relate to vital portions of the Court's charge to the jury,[1] and are chosen for discussion at this point as affording the quickest insight into the basis upon which petitioners were tried and convicted. Considered singly or collectively it at once becomes apparent that the charge was tantamount to an instruction to convict. It left to the consideration of the jury the single question of whether the employer-employee agreements not to purchase or work upon material manufactured under a lesser wage scale, affected material man-

1. Full charge to the jury appears R. 1132 *et seq.*

ufactured in states other than California. It removed all questions of fact under the Clayton and Norris-LaGuardia Acts.

It has been seen from a discussion of the evidence under the preceding point, from the testimony of both employer and union defendants, who negotiated the agreements, that the so-called restrictive clauses arose from the union demands for a closed shop and resulted from the employees' objection to working on non-union material. These are clearly legitimate union objectives and relate directly to terms and conditions of employment. The evidence further shows that the employees resisted the demand and gained the concession of exempting certain material from the policy, and that paragraphs 16 and 17 of the 1936 agreement were reached as a settlement of the union demands only after several months of negotiation and dispute. These paragraphs on their face relate to terms and conditions of employment, and are directly relevant to carry out the union objections to working on material considered unfair as measured by the standard of the wage scale established under the agreement. We have argued under the previous topic that the evidence shows without substantial conflict that the case is within the protection of the Clayton and Norris-LaGuardia Acts. Notwithstanding such evidence the foregoing instruction charges flatly that such a provision, if it affects out of state material, violates the Sherman Law and that it would be no defense that it was arrived at in settlement of a labor dispute. This withdrew from the jury the question of fact whether the contract provisions which are the foundation for the prosecution's case resulted from and were agreed upon in settlement of a bona fide labor dispute. The instruction goes to the extreme of denying application of the Clayton and Norris-LaGuardia Acts as a matter of law.

There is no legal support for the instruction in either the statutes or the decisions prior to the one under re-

view. It is the policy of the Federal statutes that employers and employees should bargain collectively and engagement in and settlement of labor disputes by peaceable, conventional means is expressly condoned. It would indeed be an anomaly to hold that once the parties have done what the law exhorts—and reached an agreement fixing the terms and conditions of employment in settlement of a labor dispute—that legality ceases and the agreement becomes a one-way passage to fine or imprisonment. There is nothing in the text of the statutes to justify such a conclusion. On the contrary the Norris-LaGuardia Act (*supra*), Sec. 104-h expressly embraces agreements as being within the protection of the law.

This instruction told the jury that where you find an agreement between employer and employee the effect of which is to place any restraint upon interstate commerce —then it makes no difference what the purpose is behind the agreement—or whether it settled a labor dispute arising from labor's demands as to terms and conditions of employment. If such is the law then this Court overlooked the existence of such an agreement in the cement mixer case. *U. S.* v. *International Hod Carriers* (*supra*). And the employer in the *Gundersheimer Bakery* case (*supra*) could never lawfully settle his labor dispute by agreeing to accede to his employees' demands not to buy cakes made under a lower wage scale in an adjoining state.

(A-2) The Court erred in instructing the jury, as follows:

"If you find that the employer and labor union defendants entered into a combination and conspiracy, the object of which was to prevent the purchase or importation by the employer defendants or other persons, firms, corporations, or parties within the State of California of patterned lumber and millwork manu-

factured under conditions unfair to the employer defendants including patterned lumber and millwork manufactured outside the State of California; or if you find that the employer and labor union defendants entered into a combination and conspiracy, the object of which was to prevent the purchase or importation by the employer defendants or other persons, firms, corporations, or parties within the State of California of patterned lumber and millwork manufactured under a lower wage scale than that prevailing in the San Francisco Bay Area, including patterned lumber and millwork manufactured outside the State of California, such a combination and conspiracy would constitute a violation of the Sherman Act, as charged in the indictment. It would constitute no defense under the law, either to the employer defendants or to the labor union defendants, that the combination and conspiracy may have been arrived at as the result of the settlement of a labor dispute; and it would likewise constitute no defense under the law that any such combination and conspiracy may have been arrived at as the result of proceedings in arbitration of such a dispute."

To which defendants excepted, as follows:

"We except to the charge that * * * if the parties entered into a conspiracy not to work on material unfair to employers, regardless of their motives or intent on the part of the union defendants, such would constitute a violation of the act—I am referring to the Sherman Act * * * and if a conspiracy was entered into not to purchase or work upon lower wage scale material, affecting materials from outside the State of California, that that in and of itself would constitute a violation of the Sherman Act regardless of motive, intent or objectives with which the Union defendants were acting, and it is no defense that any activities here resulted from labor disputes."

(Assignment 56, R. 1537.)

This is virtually a repetition of the instruction which is the subject of the next preceding assignment and aggravates the error there considered. The only difference was to substitute the words "combination" and "conspiracy" for "agreement" and "understanding". The terms "combination" and "conspiracy" have acquired a sinister aspect from the crimes with which their usage associates them. When it is recognized, however, that a combination or conspiracy is constituted by an agreement, *Lynch* v. *Magnavox Co.*, 94 F. 2d, 883 (C. C. A. 9—1938), that conspiring or agreeing to do a lawful thing is not unlawful, *McKay* v. *Retail Auto, etc. Union* (*supra*), and that admittedly the Sherman Act does not condemn all combinations and conspiracies which interrupt interstate transportation, *Apex* v. *Leader* (*supra*), the fallacy of the instruction clearly appears. Although the *Hutcheson* case (*supra*), page 231, holds that whether trade union activity violates the Sherman Law is to be determined by reading it with Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct, this instruction denied application of the two latter statutes to the case as a matter of law, presumably because an agreement was reached between employers and employees. Any question of fact as to the circumstances under which the agreement was reached was withdrawn from the jury.

(A-3) The Court erred in instructing the jury, as follows:

> "Labor unions or their members may join together in promoting their self-interest, even though their acts in so doing may result in an undue obstruction of interstate commerce. But they can do this only so long as they act in their self-interest and do not combine with non-labor groups. Here the Government charges that the labor union defendants com-

bined and conspired with the non-labor defendants in entering into and doing the things complained of, which charge, if true, is a violation of the Sherman Act. So, if any one or more of the labor union defendants combined and conspired with any one or more of the non-labor defendants, including those pleading nolo contendere, to do the things that the Government charges here, even though the motive of the labor union defendants was to promote their self-interest, you must find the defendants, or any of them, who so combined and conspired, guilty as charged,"

To which defendants excepted, as follows:

"I also except to that portion of your Honor's charge which in effect stated that the mere fact of an agreement with a non-labor defendant under the circumstances described in your Honor's charge would amount to a violation of the statute; also in that connection, the statement, in effect, that to promote self-interest was no defense."

(Assignment 76, R. 1552.)

The instruction squarely charged that the motive or intent with which the union appellants acted, i.e., the end or objective sought, was immaterial, though it be entirely to promote self-interest.

The theory upon which such a charge could be founded is not readily ascertained from the statutes or cases. The language of the statute carries no suggestion that an agreement between employers and employees is illegal *per se*, regardless of the nature of the restraint or the end or purpose sought. Agreements involving employer groups alone are tested by the rule of reason, with the qualification in the case of price fixing agreements that reasonableness of price is no defense, and there is certainly nothing in the law to indicate that merely because of the participation of labor a different rule applies. That the opposite is true is illustrated by the case of *Windo*

Glass Mfgrs. v. U. S., 263 U. S. 403 (1923), decided without reference to the Clayton Act.

The only explanation which occurs to us for the instruction is that it is predicated upon a distortion of Mr. Justice Frankfurter's language in the *Hutcheson* case to mean that where you do find an agreement between employers and employees, then regardless of the fact it is brought about by the self-interest of the union, and irrespective of the rightness or wrongness, reasonableness or unreasonableness of the end sought, a violation exists. Such an interpretation would not only take us backward before the enactment of the Clayton and Norris-LaGuardia Acts, but regress beyond the time that the rule of reason was invoked. The language itself bears the opposite implication and indicates that where an agreement between employers and employees exists, then whether the union acted in its self-interest and for a proper end are controlling factors in determining legality.

We need only to revert to the decision in *Apex Hosiery v. Leader.* (*supra*) to know that such a construction as would support the instruction is not possible. There we find unequivocal language to the effect that the elimination of price competition based on difference in labor standards by collective bargaining agreements is the objective of any national union and that the effect of such upon price competition is not the kind of curtailment prohibited by the Sherman Act. It was also pointed out in the *Apex* case that in both the *Bedford Stone* case and *Duplex Printing Co.* cases the fact that the objective of the restraint was the strengthening of the bargaining position of the union and not the elimination of business competition was thought immaterial. Consider then that these two latter cases have been expressly repudiated by the *Hutcheson* case, and in this light let us examine the *Bedford Stone* case and compare it to the instant one. There the restraint consisted in the refusal of the union to work on stone declared unfair and shipped interstate from an

open shop quarry with the purpose and effect of preventing the interstate sale of the stone in competition with the product of unionized producers. The ultimate objective was unionization of the quarries.

In the instant case it is certainly material to determine whether union objectives of unionization and standardization of wages were the purposes for which the union appellants acted—or to restrain competition from outside material for the benefit of their employers. There is not the slightest basis, in precedent or reason, to hold that simply because union objectives have been attained through an agreement with employers designed to eliminate the requirement that they work upon material considered to be unfair, that the motives and objectives of the union which are effectuated by the agreement become immaterial. The cases with direct bearing on this subject could be multiplied indefinitely but we will refer to only a few of the more pertinent.

The subject is discussed in *Truck Drivers' Local v. U. S.*, 128 F. (2d) 227, 232 (C. C. A. 8—1942) as follows:

> "The Supreme Court has not undertaken to define the boundaries of the situations in which labor organizations may become subject to the operation of the Sherman Act, and perhaps no such limitative definition is possible or desirable. Its recent opinions have however contained some clear implicational expressions that touch the present situation. Thus, in Apex Hosiery Co. v. Leader, supra, at page 501 of 310 U. S., page 996 of 60 S. Ct., 84 L. Ed. 1311, 128 A. L. R. 1044, it was pointed out: 'This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See United States v. Brims, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403; Local 167 v. United States, 291 U. S. 293, 54 S. Ct. 396, 78 L. Ed. 804.' In United States v. Hutcheson, 312 U. S. 219, 232, 61 S. Ct. 463, 466, 85 L. Ed. 788, the Court, speaking through Mr. Justice Frankfurter, again implicationally declared:

'So long as a union acts in its self interest and does not combine with non-labor groups, the licit and the illicit under Section 20 (of the Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.'

In the Brims and Local 167 cases, cited in the quotation from the Apex Hosiery Co. case, supra, the Court, in affirming convictions under the Sherman Act against a labor and non-labor group, assumed the applicability of the Act to the labor group as part of the combination in the situations involved, but did not specifically discuss the question. In Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A. L. R. 791, the dissenting opinion of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, pointed out, at page 64 of 274 U. S., page 531 of 47 S. Ct., that in the Brims case, in which both he and Mr. Justice Holmes had concurred, 'the purpose of the combination was not primarily to further the interests of the union carpenters. The immediate purpose was to suppress competition with the Chicago manufacturers'.

(2-4) From the implications of the cases which have been referred to, it seems clear that, if a labor union and its members act wholly by themselves or in conjunction with other labor groups, in the sphere and by the methods recognized in the Clayton and the Norris-LaGuardia Acts, to carry out the legitimate objects of such an organization, in improving or preserving the economic position of labor in industry and its employment relationships and conditions, they are not subject to prosecution under the Sherman Act merely because their acts may incidentally serve to affect and restrain trade or commerce;[1] but that, if

[1] In his dissenting opinion in Duplex Printing Press Co. v. Deering, 254 U. S. 443, 480, 41 S. Ct. 172, 183, 65 L. Ed. 349, 16 A. L. R. 196, Mr. Justice Brandeis said that the Clayton Act in effect "declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course."

they undertake to act jointly with any non-labor group, whose object is to effect an illegal restraint of trade or commerce, and, as part of a concerted plan or effort, they agree or undertake to do any act, whose purpose may reasonably be construed to be directly intended to assist such non-labor group in accomplishing its illegal purpose, even though the result may also be beneficial to the position of labor, they may become subject to the operation of the Sherman Act. Thus, labor cannot seek to accomplish its legitimate objects through the illegal means of combining or conspiring with a non-labor group to fix or maintain prices on goods moving in interstate commerce without subjecting itself to the possibility of criminal prosecution under the provisions of the Sherman Act.

(5, 6) Perhaps a simple way of translating the two contrasting situations into conventional legal formula would be to say that, in the first, no intent to violate the Sherman Act can exist as a matter of law; and that, in the second, the law permits the purpose or intent of the labor group to become a question of fact. If the evidence is fairly and reasonably susceptible to the interpretation that an agreement or participative collaboration has existed for the purpose of directly assisting a non-labor group to accomplish an illegal restraint, such as fixing or maintaining prices, the facts of the situation, including the purpose or intent of the labor union and its members, will ordinarily, in a criminal prosecution under the Sherman Act, have to be submitted to a jury for its determination."

We do not subscribe to the full doctrine just quoted, if it is to be construed as meaning that labor cannot enforce its own policies even by agreement and combination with employers, because a different motive or intent may exist on the part of such employers. It is also to be observed that the Court did not consider the effect which the existence or non-existence of a labor dispute might have upon the conduct of the parties. Regardless of the line of demarcation which governs the legality or illegality of

labor conduct, it cannot be seriously doubted that the view expressed is sound that labor cannot come within the ambit of the Sherman Act when acting with relation to matters affecting its employment, unless an illegal intent exists to directly assist a non-labor group to accomplish an illegal restraint.

The anomaly is that the Trial Judge in the instant case distinguishes it from the charge of the indictment held by him to be insufficient in the case of *U. S.* v. *Bay Area Painters (supra)*, 49 F. Supp. at p. 735, because of difference in purpose. To the instant case is ascribed a purpose to eliminate competition in lumber and millwork from other states. Yet defense on this very issue of purpose was completely foreclosed. The agreement was condemned as to purpose as a matter of law, although patently it related directly to terms and conditions of employment.

The materiality and importance of motive and intent is illustrated by the *Coronado* cases where the difference in the evidence on this exact issue led to opposite conclusions. In *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344 (1921), the Court deemed the evidence insufficient to show a violation of the Sherman Act where it showed union activity to press unionization of non-union mines, not only as a direct means of bettering conditions and wages of the workers, but also as a means of lessening interstate competition for union operators which would in turn lessen the pressure of those operators for reduction of the union scale, or resistance to an increase. The latter motive was said to be secondary and ancillary, whose actuating force in a particular case depends on the particular circumstances. In the second case, *Coronado Co.* v. *U. M. Workers*, 268 U. S. 295 (1925), the Court held an instructed verdict for the local unions erroneous where there was sufficient evidence to show that the purpose of the defendants who had unlawfully prevented the manufacture and production of material in interstate commerce was to control the supply or price in interstate markets.

The bearing that intent has upon the existence or non-existence of a violation, where as in the instant case the activities complained of are entirely intrastate, is referred to in *Schechter* v. *U. S.*, 295 U. S. 495 (1935), at page 547 as follows:

> "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 310. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 410, 411; United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457, 464-467; Industrial Association v. United States, 268 U. S. 64, 82; Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 107, 108. In the case last cited we quoted with approval the rule that had been stated and applied in Industrial Association v. United States, supra, after review of the decisions as follows: 'The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.'"

In *U. S.* v. *Brims*, 272 U. S. 549 (1926), the case upon which principal reliance is placed to support the convictions, it is significant that the Court held that the evidence reasonably tended to show the combination was brought

about for the purpose of eliminating competition from outside material, and as intended by all the parties such competition was cut down and interstate commerce thereby directly impeded. It is apparent that the basis of the decision is that this intent and purpose of the parties was the reason their conduct was illegal.

It is also noteworthy that the draftsman of the indictment considered it material to allege that the union defendants were not acting to promote any legitimate objective of labor or in a labor dispute. It is perfectly obvious from this that it was the Government's own theory of its case that the unions were not acting in their own self-interest, except, perhaps, to receive increased pay, in exchange for using their economic weapons to assist the employers to stifle competition.

The reason for this is no farther away than the express language of the statute under which the case was brought, for as amended by Section 6 of the Clayton Act it provides that nothing in the anti-trust laws shall be construed to forbid the existence and operation of a labor organization, or restrain individual members from carrying out the legitimate objects thereof.

If this is not enough to make the motive, intent and object with which a labor defendant acts material when charged with a violation of the law, and we can conceive of no good reason to ignore the plain language of the statute, then apart from the position of labor, the intent with which the parties acted was still vital and material to judge the effect of the agreement and activities of defendants upon interstate trade. The language of Justice Brandeis applied to a non-labor group in *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231, at p. 238 (1918), is instructive in this regard:

> "The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an im-

portant part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject."

Certainly the agreement in the instant case is not *per se* of such nature as to bespeak a direct intent and purpose to restrain interstate commerce. Nor is its necessary effect such as to directly and substantially restrain that commerce so that as said in the second *Coronado* case such intent must in reason be inferred. On the contrary it relates to conditions of manufacture and labor and if its intent and purpose was to carry out the union objectives of unionization and standardization of wages, the policy of the law recognizes that such serves not to impede the flow of interstate commerce, but in the long run to aid it by eliminating the stoppages occasioned by industrial strife flowing from the existence of different labor standards in an industry.

Aside from this the presumption of wrongful intent from the natural result of an act is not conclusive and may be rebutted by other evidence, and it is error to instruct otherwise.

Bentall v. *U. S.*, 262 F. 744 (C. C. A. 8—1919);
Laws v. *U. S.*, 66 F. (2d) 870 (C. C. A. 10—1933).

The intent with which defendants acted would not only be material, but a controlling factor, and was a question for the jury.

Lawlor v. *Loewe*, 187 Fed. 522, p. 527 (C. C. A. 2—1911);
Silverstein v. *Local 880*, 284 Fed. 833 (C. C. A. 8—1923).

The ruling that the union ends and objectives were immaterial is therefore entirely unsupportable and contrary to law.

(A-4) The Court erred in instructing the jury, as follows:

"Some testimony has been heard here concerning the union label of the United Brotherhood of Carpenters and Joiners of America. In this connection, I charge you that whether the millwork and patterned lumber involved in the testimony in this case was manufactured in mills whose employees were members of the United Brotherhood of Carpenters and Joiners of America or of its affiliated unions, or whether such millwork and patterned lumber bore a union label is not to be considered by you. The sole question is whether defendants intended to or did restrain the shipment of millwork and patterned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants."

To which defendants excepted as follows:

> "I also except * * * to that portion of the charge which in substance stated that the protection of the label or the use or non-uses of the label was not to be considered by the jury."
>
> **(Assignment 77, R. 1554.)**

This throws into bold relief the entire tenor of the Court's charge. The jury was told that the *sole question* was whether defendants *intended to or did* restrain shipment of material in interstate commerce pursuant to an understanding between labor union defendants and non-labor defendants.

This irrevocably excluded from the jury all questions as to the purpose of the agreement claimed to illegally restrain interstate commerce, or whether the agreement was in settlement of a labor dispute. The Clayton and Norris-La Guardia Acts were thereby completely emasculated.

The opinion of the Circuit Court of Appeals under review, 144 F. 2d 546, 554, concludes that "There is abundant evidence convincing to us as well as the jury, that the unions did not confine their efforts to promoting their self-interest but combined with the employers, creating a monopoly excluding millwork from other states, for their employers' interest as well". No such issue was presented to the jury. On the contrary, the jury was charged that the "sole question" was whether the unions restrained interstate commerce "pursuant to an understanding" with non-labor defendants. That even though acting for their self-interest, since combined with employers, they were guilty. This irrefutably demonstrates fundamental error in the conduct of the trial. It is unthinkable that unions must stop short of gaining legitimate labor objectives because such may redound to the benefit of employers' interests as well. In such case the

"rightness" or "wrongness", "licit" or "illicit" of union activity claimed to constitute an illegal restraint clearly must be judged by the purpose, intent and objective. It has not been so judged here.

The door was completely shut to any consideration of how the agreement was reached, or the reasons or purposes behind it.

(A-5) The Court erred in instructing the jury, as follows:

> "I have spoken of interstate commerce. As stated, it consists of the shipment of commodities or materials from one state to another. In this case the question is whether the labor union defendants entered into a combination with the non-labor defendants whereby the defendants intended to or did bring about an undue restriction of or interference with interstate commerce in millwork or patterned lumber. It is the nature of the restraint and its effect on interstate commerce, and not the amount of the commerce which are the tests of violation.
>
> If a group of California lumber dealers should stop a truck coming from Oregon loaded with lumber because they did not want any Oregon lumber in California, and prevent its entry, that is an unreasonable interference with interstate commerce, although it involves only one truckload of lumber."

To which defendants excepted, as follows:

> "I except further in connection with your Honor's description of the nature of the restraint and your statement, in effect, that the nature of the restraint and not the amount was the sole test of guilt."
>
> **(Assignment 54, R. 1533.)**

While this instruction embodies to some extent abstract statements of principles from the cases, when coupled with the balance of the charge and without any definition or enlargement of the rules stated, or direction as to

their proper application to the facts, it is misleading and erroneous.

Reference is made to an undue "restriction" without any suggestion of what would be a reasonable or due restraint. The jury was told it was the nature of the restraint—with no indication of what nature of restraint would be lawful. The effect upon interstate commerce is prescribed as a test, without amplification to inform that the effect should be analyzed from the standpoint of market control of a commodity.

The amount of commerce was then excluded as a test with the example given of lumber dealers stopping one truck from Oregon because they didn't want any Oregon lumber in California as an unreasonable restraint. Apply this to the union petitioners against whom it was also given and we find the jury being charged that it would be an undue and illegal restraint for them to stop one truckload of lumber from Oregon because they didn't want any Oregon lumber in California, irrespective of the reason they didn't want such lumber, and notwithstanding that such reason was removed from any effort or design to effect the market, and the restraint actually without effect upon prices and free competition.

This flies directly in the face of the following language from the *Apex* case (*supra*), p. 506:

> "It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it."

The instruction errs in two fundamentals. It misdirects as to tests to determine what is an undue restraint.

It fails to direct as to what would be a reasonable restraint. In fact neither it or any other instruction directly informed the jury of the existence of the rule of reason.

Apex v. *Leader* (*supra*);
Coronado case (*supra*);
Standard Oil v. *U. S.*, 221 U. S. 1 (1911).

(A-6) The Court erred in instructing the jury as follows:

"You are to determine the guilt or innocence of a corporation by an examination of the acts done by its responsible officers or agents. The act of an agent done for or on behalf of a corporation and within the scope of his authority, or an act which an agent has assumed to do for a corporation while performing duties actually delegated to him, is deemed to be the act of the corporation.

If you find that there did exist a combination and conspiracy such as is charged in the indictment, and that any defendant corporation participated therein, then I instruct you that such act of participating is deemed to be also the act of the individual director, officer or agent of such defendant corporation who authorized, ordered or did such act in whole or in part.

Likewise, the list of defendants includes a number of labor union organizations and several members thereof. It has been stipulated in this case that these labor unions are associations. Like corporations, associations are separate entities within the meaning of the Sherman Act, and may be found guilty of violations of that act, separately and apart from the guilt or innocence of their members.

You are to determine the guilt or innocence of the labor unions which are defendants in this case in the same manner as you determine that of the corporations, that is, by an examination of the acts of their agents."

To which defendants excepted, as follows:

"We object, or, rather, we wish to except expressly to the charge that we determine the guilt or innocence

of the labor union defendants in the same way that you would the corporations with reference to the acts of their representatives and agents and with reference to the knowledge necessary to bind the union organizations, we take that exception" and "I also except to your Honor's charge with respect to the associations or corporations and your definition of them as being in substance separate entities, similar entities, and that they could be similarly found guilty upon the basis of acts of certain individuals associated with them.

"I likewise except specifically to that portion of the charge in this connection dealing with the responsibility of unincorporated associations, particularly such as that involved here, for the acts of its agents."

The exception was well taken because such instruction was erroneous in that it applied a civil rule without fully defining it and charged the jury that the union organizations would be criminally responsible for the act of an agent done within the scope of his authority, or which he has assumed to do while performing duties actually delegated to him, without regard to the actual authority for the particular act or knowledge thereof and contrary to the provisions of the Norris-LaGuardia Act, 47 Stat. 71; 29 U.S.C.A. Sec. 106.

(Assignment 50, R. 1529.)

This instruction told the jury that the union organizations would be criminally responsible for the act of an agent done within the scope of his authority or which he had assumed to do while performing duties actually delegated to him. In other words—a representative of the union for collective bargaining could assume to make the union a party to an unlawful combination with employers to restrain trade without the authority or ratification of the union. Whether tested under the provisions of the Norris-LaGuardia Act, whose application to the case has been previously discussed, or under general principles of the law of agency in criminal cases, the instruction cannot be supported.

The Norris-LaGuardia Act required clear proof of actual authorization or ratification, after actual knowledge (Sec. 106).

The general rule is that criminal liability must be founded on authorized acts and such authority will not be presumed. A principal must knowingly and intentionally aid, advise, or encourage the criminal act to be responsible. The civil doctrine that a principal is bound by the acts of an agent within the scope of his agent's authority has no application in a criminal case.

U. S. v. *Int. Fur Workers*, 100 F. (2d) 541, 547 (C.C.A. 2—1938);
U. S. v. *Food and Grocery Bureau of So. Cal.* 43 F. Supp. 966, 971 (S. D. Cal.—1942);
People v. *Doble*, 203 Cal. 510 (1928);
2 *Corp. Jur.* p. 855, sec. 540.

(A-7) For the reasons stated in the instruction the Court erred in refusing to give instruction No. 55 requested by these defendants, as follows:

"You are instructed that an officer of a union which is an unincorporated association is not authorized merely by virtue of his office to make his union a party to an unlawful conspiracy. In order to bind any union organization, therefore, by the act of a representative or officer it is necessary to find that the union had authorized or ratified the act."

To which defendants excepted, as follows:

"I wish to take the following exceptions to the charge, if your Honor please. Referring to the proposed instructions of the union defendants, we wish to except to the Court's not giving Instructions Nos. 55, 56, 57 and 58 relating to the binding effect of representatives acts on the union defendant organizations, and with reference to the knowledge of the union

organizations of those acts, I assume that I should restrict myself to the numbers.

The Court. I think so. I think that will be sufficient."

(Assignment 51, R. 1532.)

This requested instruction was a fair statement of an applicable rule of law as established by the next preceding authorities cited, and petitioners were entitled to have it given. Instead, as we have seen, the Court applied the general civil rule of *respondeat superior*.

(A-8) For the reasons stated in the instruction the Court erred in refusing to give instruction No. 56 requested by these defendants, as follows:

"You are instructed that no labor union or organization can be found guilty in this case for an unlawful act or acts, if any, of individual officers, members or agents, unless you find upon clear proof from the evidence that such labor organization actually participated in, or actually authorized such unlawful act, if any, or ratified such an act, if any, after actual knowledge thereof."

The exception taken is quoted in Assignment No. 51, and by this reference is incorporated herein.

(Assignment 52, R. 1532.)

This request for the benefit of the labor organizations was based directly on the language of the Norris-LaGuardia Act (*supra*, Sec. 106). Either it or the equivalent should have been given, for under any possible view the questions of fact upon which would depend the application of the Act were for the jury. Also apart from the Norris-LaGuardia Act the requested instruction properly stated the criminal rule as to responsibility for acts of an agent.

(A-9) For the reasons stated in the instruction the Court erred in refusing to give instruction No. 56 requested by these defendants, as follows:

"You are instructed that no individual defendant who is an officer or member of one of the labor organizations involved can be found guilty in this case for an unlawful act, or acts, if any, of other officers, members or agents of such union organizations, except upon clear proof from the evidence that such individual defendant actually participated in or actually authorized such an act or ratified such unlawful act, if any, after actual knowledge thereof."

The exception taken is quoted in Assignment No. 51, and by this reference is incorporated herein.

(Assignment 53, R. 1533.)

This was similar to the requested instruction just discussed, proposed for the benefit of the individual labor defendants.

(A-10) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 69 requested by these defendants, as follows:

"You are instructed that as to every individual defendant affiliated with the labor unions you should return a verdict of acquittal unless you find that he was not acting in furtherance of the legitimate objects of his labor union, but on the contrary was acting in combination with the employer defendants with the intent to restrain interstate commerce in millwork and patterned lumber in order to eliminate competition and effect prices of such interstate commerce."

The exception taken is quoted in Assignment No. 57, and by this reference is incorporated herein.

(Assignment 84, R. 1558.)

The Court rejected in toto the proposed instructions of defendants, with possibly one minor exception relating to the presumption of a defendant's good character (R. 1149).

We readily concede that we were entitled to no particular verbiage, and that the Court was at full liberty to charge the jury in its own language. The proposed instructions which are the subject of assignments to be argued, are for the most part based upon legal theories inconsistent with the instructions given, or relate to matters upon which the charge was silent because, as reflected therein, they were deemed immaterial and improper considerations for the jury in reaching a verdict. An extended argument on each instruction, or even group of instructions related to a general subject, would therefore in most instances be unduly repetitious of those already directed to the charge given by the Court.

It is uniformly held that the circumstances under which and the knowledge, motives, purposes and intent with which persons act are questions of fact for a jury, guided by proper instructions from the Court as to the law.

Holt v. *U. S.*, 45 F. (2d) 392 (C.C.A. 7—1930);
Stone v. *U. S.*, 113 F. (2d) 70 (C.C.A. 6—1940);
Odom v. *U. S.*, 116 F. (2d) 996 (C.C.A. 5—1941);
People v. *McGann*, 194 Cal. 688 (1924);
23 *Corp. Jur. Sec.*, p. 616, sec. 1118; p. 621, sec. 1125; p. 622, sec. 1127.

It is equally well settled that where a correct proposition of law essential to the proper determination of issues which are for the jury is proposed by defendants and not given in substance or effect, and the jury is not properly advised thereon by the general charge, the refusal is error.

Hersh v. *U. S.*, 68 F. (2d) 799 (C.C.A. 9—1934).

The requested instruction which is the subject of this assignment is an example of the proposed instructions pertaining to what are legitimate objectives of labor and the effect of motive, intent and purpose in judging the conduct of petitioners.

Such instructions or their equivalent to cover the general subject matter should have been given unless motive, intent and purpose were immaterial. We have seen that the Court so ruled in instructing the jury that the fact these petitioners were acting in their own self-interest and to carry out their own legitimate objectives of labor could be no defense.

(A-11) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 100 requested by these defendants, as follows:

> "You are instructed that by the indictment in this case it is charged that defendant unions were not attempting to enforce or protect the right to bargain collectively nor acting in the course of a legitimate labor dispute as to wages, hours and working conditions or as to any other legitimate objective of labor, but solely to prevent the manufacturers against whom the alleged combination and conspiracy was alleged to be directed from engaging in interstate commerce in millwork and patterned lumber in the San Francisco Bay Area, and you are instructed that the burden is upon the prosecution to establish to your satisfaction beyond a reasonable doubt and to a moral certainty that such charges are true, or you should acquit the union organizations and each individual union defendant."

The exception taken is quoted in Assignment No. 57, and by this reference is incorporated herein.

(Assignment 88, R. 1561.)

Because the specific facts alleged revealed otherwise when devoid of characterization, Par. 29 of the indictment contained the charge that petitioners were not acting in the course of a labor dispute or to enforce a legitimate objective of labor—but rather to prevent manufacturers from engaging in interstate commerce (R. 32). This had direct relation to appellants' intent. The burden of proving an unlawful intent was upon the prosecution and the instruction should have been given.

Minner v. *U. S.*, 57 F. (2d) 506 (C.C.A. 10—1932); *Boatright* v. *U. S.*, 105 F. (2d) 737 (C.C.A. 8—1939).

(A-12) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 105 requested by these defendants, as follows:

> "You are instructed that as to every individual defendant affiliated with the labor unions you should return a verdict of acquittal unless you find that he was not acting in furtherance of the legitimate objects of his labor union, but on the contrary was acting in combination with the employer defendants with the intent to restrain interstate commerce in millwork and patterned lumber."

The exception taken is quoted in Assignment No. 57, and by this reference is incorporated herein.

(Assignment 89, R. 1562.)

Clayton and Norris-LaGuardia Acts (*supra*).

(A-13) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 70 requested by the employer defendants, as follows:

"A labor dispute may be defined as a controversy concerning terms or conditions of employment.

A controversy by defendant manufacturers with defendant unions concerning whether defendant manufacturers should purchase millwork and patterned lumber manufactured under certain specified conditions would be a controversy concerning terms of employment, and therefore, a labor dispute."

The exception taken is quoted in Assignment No. 72, and by this reference is incorporated herein.

(Assignment 74, R. 1551.)

U. S. v. *Hutcheson* (*supra*).

(A-14) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 71 requested by the employer defendants, as follows:

"You are instructed that a contract concerning terms or conditions of employment between organizations of employers and organizations of employees, arising or growing out of a labor dispute, is not a violation of the Sherman Anti-Trust Act.

A provision in a contract, arising out of a labor dispute, requiring defendants to purchase only material that was produced under certain specified conditions would be one concerning terms or conditions of employment."

The exception taken is quoted in Assignment No. 72, and by this reference is incorporated herein.

(Assignment 75, R. 1552.)

U. S. v. *Hutcheson* (*supra*).

(A-15) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 79 requested by these defendants, as follows:

"You are instructed that if the agreement of September 21, 1936 between the union defendants and employers was made after or as a result of a controversy or dispute as to wages and conditions of employment and the union defendants demanded or wanted the provision thereof that no material should be purchased or work done thereon which had been manufactured or distributed under rates of wage and working conditions not conforming to such agreement, in order to establish a uniform condition of labor conditions, unionize other mills in the industry, gain jobs or better wages, or for any other legitimate purpose of a labor organization, you should acquit the union defendants for then neither the making of said agreement, nor any renewal thereof, nor the carrying out of such an agreement by the means charged in the indictment, is unlawful on the part of the union defendants."

The exception taken is quoted in Assignment No. 57, and by this reference is incorporated herein.

(Assignment 70, R. 1549.)

Clayton and Norris-LaGuardia Acts (*supra*);
Apex Hosiery v. *Leader* (*supra*);
U. S. v. *Hutcheson* (*supra*).

(A-16) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 62 requested by the employer defendants, as follows:

"You are instructed that the public policy of the United States guarantees full freedom to labor to organize for the purpose of negotiating the terms and conditions of employment and in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is the public policy of the United States to encourage industrial peace by the execution of collective bargaining agreements between labor and employer.

You are instructed, therefore, to draw no inference of guilt or wrongdoing merely because of the execution between defendants of an agreement respecting wages, hours and working conditions."

(Assignment 112, R. 1574.)

Norris-LaGuardia Act (*supra*).

(A-17) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 65 requested by these defendants, as follows:

"You are instructed that the Sherman Act is not aimed at the policing of interstate transportation or movement of goods. You are instructed that a labor union has a constitutional right to picket any railroad car or other container of products which is considered unfair to union labor because of the conditions of employment under which such products have been produced in order to advertise to the world that such goods are unfair. You are further charged that any person may lawfully decline to work upon or handle such products considered unfair to the labor organization with which he is affiliated and none of such acts is unlawful under the Sherman Act."

The exception taken is quoted in Assignment No. 57, and by this reference is incorporated herein.

(Assignment 81, R. 1556.)

The prosecution charged and produced evidence to show picketing on the part of the unions on the theory that such were overt acts under the alleged conspiracy. The Court declined to give the foregoing instruction and others such as the one which is the subject of the next assignment. These were framed to advise the jury as to

lawfulness of proper picketing and other conventional means of carrying out labor's own objectives. Again we revert to the obvious proposition that it was for the jury to determine whether the activities testified about were overt acts under an unlawful conspiracy or normal labor union conduct to advertise its own grievances and carry out its fight against unfair material.

This group of requested instructions was unquestionably sound in law, pertinent to the evidence and important to the considerations of the jury.

Apex Hosiery v. *Leader* (*supra*);
Thornhill v. *Alabama* (*supra*);
Clayton and Norris-LaGuardia Acts (*supra*).

(A-18) For the reasons stated in the instruction, the Court erred in refusing to give instruction No. 97 requested by these defendants, as follows:

"You are instructed that the union defendants have the right to decline to work or agree not to work upon products made by a CIO or a company union in carrying out their own labor objectives."

The exception is quoted in Assignment No. 57, and by this reference is incorporated herein.

(Assignment 97, R. 1566.)

B. Evidentiary Rulings

(B-1) The Court erred in excluding the testimony of defendants' witness, Emil H. Ovenberg, as follows:

"Q. Now, with reference to all of your activities as a negotiator, or as a representative of your organization, or as an individual, were you acting with the intent to promote the interests of yourself and your organization?

A. Sincerely and honestly——

Mr Burdell. I object to that and ask that the answer go out.

The Court. Yes, it may go out.

Mr. Burdell. I object to it as calling for the opinion and conclusion of the witness, and immaterial, irrelevant to any issue in this case.

The Court. Sustained.

Mr. Howard. If I may call to your Honor's attention, I believe that the question of intent is vital here, and exceedingly material. Your Honor will bear in mind paragraph 29 of the indictment, which has a direct bearing on this issue, in which the charge is made that these men were not intending to promote their own interest, or with an intent of promoting the objective of labor. I have cases here, your Honor.

The Court. I have cases here, too. The ruling will stand.

Mr. Howard. May I, in order that there be no question about the form of the question, then, make this offer of proof, that we offer to prove by this witness, who is a union negotiator or representative of the union in connection with the negotiation of the disputes with employers in the period of 1936 and again in 1938, that he intended only to act in promotion of his union demands and objectives. I wish to make that as an offer of proof.

The Court. Any objection?

Mr. Burdell. Yes, we object to that as having no probative value at all, any question of intent is immaterial to this case, and further the intent which is included in this offer is not consistent with any such intent as may be necessary to sustain the allegations of the indictment.

The Court. Objection sustained.

Mr. Faulkner. Your Honor is not ruling intent and motive does not enter into a conspiracy charge?

The Court. Absolutely, that is what I am ruling, in a conspiracy charge.

Mr. Faulkner. That intent does not enter into it?

The Court. The intent is immaterial here at this time. That is what I am ruling.

Mr. Faulkner. Very well."

(Assignment 30, R. 1483.)

Since this is the first evidentiary ruling to be argued we make the general observation that the District Court in such rulings went to the full extreme and even beyond the limits of the theories expounded in the instructions already considered.

It is established by practically uniform authority that where the motive, intent or reasons which actuate an individual are material, that individual is competent to testify directly as to the motive and intent with which he acted.

Crawford v. *U. S.*, 212 U. S. 183 (1909);
10 *R. C. L.* p. 946, sec. 116;
8 *R. C. L.* p. 181, sec 174.

We have already argued the materiality of motive and intent and will not repeat. In passing we do wish to point out that besides the charge that the unions were not acting in their own self-interest for union objectives, to which the evidence would clearly be relevant, we find in the instruction of the Court which is the subject of assignment No. 54, (R. 54, 55), the jury was told that if defendants *intended* to or did bring about an undue restraint they would be guilty. Yet direct evidence as to actual intent was denied petitioners. The Court consistently so ruled as indicated by assignments of error affecting the testimony of other defendants which will not separately be argued (R. 1497, 1498, 1525).

(B-2) The Court erred in excluding the testimony on cross examination of plaintiff's witness, Willard B. Jefferson, as follows:

"Mr. Boutzohn. Q. Was this non-union lumber that you purchased at that time?

Mr. Clark. I object on the same grounds (immaterial, irrelevant and incompetent).

A. As far as I know, it was.

The Court. Sustained."

(Assignment 14, R. 1457.)

The witness had testified he was told by a representative of the unions he would not deliver certain material purchased from a firm in Missouri to jobs in San Francisco unless it had the local union stamp on it (R. 367, 368). This purported to be proof of an overt act done pursuant to the alleged agreement and conspiracy. The excluded testimony had direct bearing upon the question of whether the activity described in the direct testimony had any relation to a contract between employers and employees. Regardless of the working conditions under which produced, if it was non-union material it would be rejected by the unions as unfair for that reason alone. On the other hand, if the jury concluded that the evidence did reveal conduct related to the restrictive clause of the employer-employee contract, the fact that it was non-union material would have substantial probative force upon the meaning, purpose and effect of those provisions.

(B-3) The Court erred in excluding the testimony of defendants' witness, Walter C. O'Leary, as follows:

"Q. Do you know whether the Aladdin Company was union or non-union?

Mr. Zirpoli. We object to that.

The Court. Sustained."

(Assignment 39, R. 1499.)

Testimony about the Aladdin Company involved the petitioner Charles Roe. The evidence as to that defendand showed that he was not a member of a millworkers union and had neither negotiated nor signed any of the contracts in the case. He had cited the Aladdin Company representative in connection with the unfair or we do not patronize list—and it was important to show that such was a non-union firm—particularly from the standpoint of the motives which would prompt the defendant Roe and bear on whether his action was a part of that claimed to be referable to an agreement with employers and in furtherance of the alleged conspiracy. Under any conception of the law the testimony was material.

(B-4) The Court erred in excluding the testimony of defendants' witness, Kenneth Davis, concerning the affiliation of certain firms in the Northwest with defendant, United Brotherhood of Carpenters and Joiners of America and their right to use its label and in sustaining the objection to defendants' offer of proof through such witness, as follows:

"Q. I call your attention, Mr. Davis, to the McCleary Timber Company which has been previously testified about in this case, the testimony appears in transcript No. 4 at page 320, and ask you if you know whether or not during the period from 1936 to 1940 that company was organized by the United Brotherhood of Carpenters and had the right to use the label of the United Brotherhood of Carpenters on its woodwork and material?

Mr. Zirpoli: I object. This is immaterial and irrelevant and not within the issues of the case.

The Court: Sustained.

Mr. Carson, II. I would like to make an offer of proof in this connection.

The Court: Yes.

Mr. Carson. H. The testimony of this witness will show that the McCleary Timber Company, the Weyerhaeuser Lumber Company, the Long-Bell Lumber Company, the Central Door and Lumber Company of Portland, Oregon, the Central Door and Plywood Company of Albany, the G. D. Johnson Company, the Robinson Manufacturing Company at Everett, Washington, the Ewauna Box Company at Klamath Falls and the Algoma Lumber Company at Algoma, Oregon, from the period 1936 to the period of 1940 were not organized by the United Brotherhood of Carpenters, were not working under a contract with any local union or affiliated organization of the United Brotherhood of Carpenters, did not possess the right to use the union label, and none of their products with the exception of the doors of the Central Door and Lumber Company possessed the union label.

Mr. Zirpoli. I make the same objection, your Honor; it is immaterial and irrelevant and not within the issues of this case.

Mr. Routzohn. Your Honor please, I am not certain that the full import of this testimony is being considered at this time.

The Court. I understand it fully. If you wish to add anything to the offer that has been made by Mr. Carson, you may.

Mr. Routzohn. Merely a statement as to purpose, your Honor.

The Court. I don't care to hear anything further. I think Mr. Carson has made it quite clear. The objection will be sustained."

(Assignment 40, R. 1499.)

This assignment demonstrates how unequivocal and complete was the ruling of the Court that it was of no relevancy that the alleged overt acts of the unions sought to be attributed to an agreement between employers and employees were directed to non-union material. The basis for such a ruling is difficult to understand. Accepting for the sake of the argument the Court's theory that motive, purpose and reason were all immaterial and

"that the mere existence of an agreement between employers and employees, the effect of which was to restrain interstate commerce violated the statute, still the materiality of the evidence clearly appears. Activity related to the material of the firms involved was permitted to be shown and would bear on the issue of whether the agreements did affect interstate commerce. The Court's instructions concede what is undeniably the law that in the absence of such an agreement, union activity directed to non-union materials would be legal. Yet this evidence was rejected which would show union activity which would be carried on independent of any agreement with employers —and thus affect directly the question of whether the acts had any relation to the employer agreement.

This in effect rejected the sole defense which the instructions left to the appellants, i.e., whether the agreements included material from other States.

(B-5) The Court erred in excluding the testimony on cross-examination of plaintiff's witness, Emory J. Nutting, as follows:

"It was the purpose of these negotiations to attempt to arrive at some agreement. I would say my best recollection as to the period of time covered by the negotiations was 3 months.

Q. Three months. During all of that time, Mr. Nutting, there was a dispute on, was there not, between the unions on the one hand and the mill owners on the other as to the rate of wages?

Mr. Burdell. Just a moment. That calls for a conclusion of the witness and is improper cross-examination and immaterial.

The Court: Sustained.

Mr. Routzohn. Q. Was there any other dispute on at that time?

Mr. Burdell: Same objection.

The Court: Sustained.

Mr. Routzohn: I haven't asked my question yet.

The Court: Well, the question is objectionable so far as it has gone, 'Was there any other dispute.'

Mr. Routzohn: Q. What were these negotiations that lasted three months?

Mr. Burdell: Objected to.

The Court: It is quite clear the negotiations related to wages and with reference to an agreement and it was signed. Isn't that quite plain? Why take up time cross-examining on that subject?

Mr. Routzohn: If your Honor thinks I am taking too much time, I will desist.

The Court: Well, I think it is quite clear what you are trying to show by this witness.

Mr. Routzohn: Yes. Your Honor in the very beginning told us we would have to establish that there was a labor dispute. That is exactly what I am trying to show.

The Court: You have asked him if there was a labor dispute, which you have no right to do.

Mr. Routzohn: The witnesses have been asked for many a conclusion at this trial, I have noticed.

The Court: That may be so."

(Assignment 15, R. 1457.)

It is to be seen from this ruling that the Court not only instructed that the existence of a labor dispute would be no defense, but also excluded cross-examination to show that activities concerning which the prosecution produced evidence resulted from a labor dispute.

(B-6) The Court erred in excluding the testimony of defendants' witness Kenneth Davis and defendants' offer of proof through such witness thereby rejecting evidence to show the organization efforts of the United Brotherhood of Carpenters and Joiners of America in the Northwest during the period 1936 to 1940, and the counter efforts of the C.I.O. and the industrial war that arose therefrom, and that activities of the appellants in the Bay Counties area

were allied to and a part of the organization efforts of the United Brotherhood of Carpenters in the Northwest and the efforts to stop the inroads of the C.I.O.

(Assignment in full being No. 41 is quoted in Appendix, p. 80.)

It can no longer be doubted that acts resulting from conflicts involving rival unions are as much within the immunity of the Clayton and Norris-LaGuardia Acts as activities arising directly from a struggle between employer and employee.

U. S. v. *Hutcheson* (*supra*).

This evidence was therefore patently proper unless the mere existence of an agreement with the employers made immaterial the ends which prompted the unions to make such agreement, and eliminated all questions concerning the motive and intent with which, and the circumstances under which appellants acted. The exclusion of this testimony is a glaring example of the Court's basic ruling that the existence of a labor dispute was immaterial. This again eliminated the Norris-LaGuardia Act from the case as a matter of law.

(B-7) The Court erred in refusing to admit in evidence Defendants' Exhibit 2-M for Identification, which was a circular letter from the General Executive Board of United Brotherhood of Carpenters and Joiners of America to officers and members of all local unions and district councils to the effect that a sub-committee acting on instructions of the General Convention held in December, 1936, had visited the Northwest to find communistic and adverse influences working to destroy the activities of the United Brotherhood, and that before a report could be made a C.I.O. charter to a dual organization had been issued;

that members must not handle products of an employer of C.I.O labor and that the watchword should be "no C.I.O. lumber or millwork in your district".

(Assignment in full being No. 42 is quoted in Appendix, p. 83.)

This offered evidence had a direct bearing on the motives, intent and purposes actuating petitioners. It showed that the union defendants were acting to aid themselves and promote their organization efforts in the industry involved in a collateral labor dispute with a rival labor organization. If such is material, then it was error to reject the evidence, for it is established that just as direct evidence of intent is admissible, so is any other fact or circumstance which throws light on the intent with which a person acts.

Miller v. *U. S.*, 120 F. (2d) 968 (C.C.A. 10—1941);
People v. *Becker*, 137 Cal. App. 349 (1934).

(B-8) The Court erred in excluding the testimony on cross examination of plaintiff's witness, E. W. Yates, as follows:

"That material we bought from mills at Portland, the Jones Lumber Company, and a little Company at The Dalles, Oregon.

Q. Did you know at that time and do you know now whether or not some of those companies were organized under the C.I.O.?

Mr. Zirpoli. I object. I have not interposed this objection, but it seems to me it is irrelevant and immaterial.

The Court. I do not think it makes any difference whether it was the C.I.O. or A.F.L. Sustained.

Mr. Routzohn. Our point is, of course, if it did not bear the union stamp of the Carpenter Brother-

hood of the A.F.L. that we had a perfect right to keep it out.

The Court. Objection sustained."

(Assignment 13, R. 1456.)

Just as it was material to prove a product was non-union, it was likewise highly important to show it C.I.O. In both instances it was relevant to show that any discrimination was not because it was out of the state material—or material from competitors of the employer—but because it was unfair material.

(B-9) The Court erred in excluding the testimony on cross-examination of plaintiff's witness, John Carrick, as follows:

"I discovered from experience 'hot cargo' or 'hot lumber' is something I could not buy. It meant something you can't bring in.

Q. You couldn't bring it in because there was a dispute on, a war on labor between the C.I.O. and the Carpenters' Brotherhood, which was an A. F. of L. organization? Didn't you understand that?

Mr. Zirpoli: I object to that as irrelevant, and immaterial. There is no issue involved in such a war.

The Court: Sustained.

Mr. Routzohn: That is all."

(Assignment 12, R. 1456.)

This ruling prevented eliciting from the witness not only that it was C.I.O. lumber which he was prevented from buying and was classified as "hot"—but that there was an actual labor dispute being waged between the C.I.O. and the Carpenters' Brotherhood at the time.

(B-10) The Court erred in excluding the testimony of defendants' witness, David H. Ryan, as follows:

"Mr. Routzohn: Q. Now, Mr. Ryan, from 1935 on, 1936, 1937, 1938, 1939, 1940 and 1941 up to the present time, have you had a continuous labor dispute with the C.I.O. in your organization?

Mr. Clark. We object, first, as immaterial; second, as calling for the opinion and conclusion of the witness.

The Court. The objection is sustained.

Mr. Routzohn. I want to prove there has been a labor dispute here, not only with these men, but with a dual organization.

The Court. The objection is sustained."

(Assignment 36, R. 1497.)

This rejected a showing through one of the defendants who negotiated the agreements challenged by the prosecution, that during the period covered by the indictment a labor dispute existed between his organization and the C.I.O. Such would bear directly on the motives and objectives with which these petitioners acted.

(B-11) The Court erred in excluding the testimony on cross-examination of plaintiff's witness, H. P. Smith, as follows:

"I am employed by Unit-Bilt Company, one of the defendants in this case. Mr. Roselyn is the head of that company and handled the Grand Rapids line under a license. His directions to me are to press Grand Rapids equipment in the sales.

Q. And in connection with those sales, you are unable to compete against local commercial fixture competition in this district; isn't that true?

Mr. Clark. I object to that as incompetent, irrelevant and immaterial.

The Court. Sustained.

Mr. Faulkner. Q. In connection with the work that you do for the Unit-Bilt people you bid, do you not, upon Grand Rapids articles?

A. We have to quote prices.

Q. You also quote prices on the same jobs for the Unit-Bilt people, don't you?

A. That is true.

Q. Which is the lower?

Mr. Clark. Your Honor, we object to that——

Mr. Court. I don't see the materiality of it. Objection sustained.

Mr. Faulkner. Well, we offer to prove, your Honor, that the prices of the Unit-Bilt fixtures are constantly lower.

Mr. Clark: Just a moment. I object to Mr. Faulkner stating what he offers to prove in the presence of the jury.

The Court. You may proceed.

Mr. Faulkner. We offer to prove by this testimony that the prices of the Unit-Bilt Company to the same customers where their prices are quoted and the Grand Rapids' are quoted, that the Unit-Bilt prices are constantly lower even when their instruction is to sell Grand Rapids goods.

The Court. Let the ruling stand."

(Assignment 20, R. 1469.)

The indictment, Paragraph VII, charges that the effect of the conspiracy was to increase prices (R. 33) and evidence of higher prices for locally manufactured material in the San Francisco Bay area was introduced (direct examination Edward A. Allen, R. 381, 382). The witness being cross-examined had just testified on direct that Grand Rapids had gotten no more jobs of importance in the Bay area although he had represented them as salesmen until going with defendant, Unit-Bilt Store Equipment Company who became licensee of Grand Rapids (R. 519). It is obvious the rejected cross-examination was proper to show both the reason Grand Rapids didn't get jobs in this area and that the local prices were competi-

tive and not higher. These things go directly to fundamentals in the case. The theory of the prosecution was that petitioners had restrained interstate trade with the effect of stifling competition and increasing prices. It was certainly relevant to show that the business decline of such an outside firm was because of inability to meet competitive prices of local firms. The evidence sought would be direct proof of such fact.

(B-12). The Court erred in excluding the testimony of defendants' witness, David H. Ryan, as follows:

"I pointed out to Mr. Williams that Walter Jacoby was there doing some work, and he said he was going to install Grand Rapids Fixtures, and we did not like Walter Jacoby, who had a habit of getting laborers and give them a pair of overalls and some tools and get him on the job and do the work of a carpenter.

Mr. Clark: I object to that.

Mr. Routzohn: I think that is very important.

The Court: I don't think it is.

Mr. Routzohn: I suppose I should show, if your Honor please, that Mr. Jacoby had not been employing union labor.

The Court: It is unimportant whether he did or not. I do not see that it has anything to do with the issues here, at all.

Mr. Routzohn: I would like to make that proffer, that Mr. Jacoby was not——

The Court: If you wish to ask the question, you can.

Mr. Routzohn: Q. Was it your objection that Mr. Jacoby, who was there for the Walter Manufacturing Company, did not comply with the labor conditions that were set forth in your contract?

Mr. Clark: I object to that on the ground it is immaterial, irrelevant, and incompetent, and also leading.

The Court: Sustained.

Mr. Routzohn: Tell us what you said relative to Mr. Jacoby?

A) I told Mr. Williams that there were non-union men working in the basement of Roos Bros.——

Mr. Clark: We move to strike that out as irrelevant.

The Court: It seems to me it is immaterial here. I think you are going very far afield. It may go out."

(Assignment 31, R. 1485.)

The theory in classifying this testimony as immaterial and far afield is difficult to comprehend. The Government witness Williams had testified to this very conversation about which the defendant Ryan was sought to be interrogated (R. 468). The Government's evidence on this subject was designed to show a discrimination and restraint against the material of Grand Rapids Fixtures. The obvious purport of the rejected testimony was to show that defendant Ryan wasn't objecting to installation because they were the fixtures of an outside firm, but because of the local labor conditions under which they were being installed by non-union labor. It was a directly pertinent portion of the very conversation concerning which the Government witness had testified, and if there was any connection it would always affect the veracity of the version of the conversation given by the prosecution witness.

The law is clear that the evidence was admissible.

10 *R. C. L.* p. 935, sec. 101.

(B-13) The Court erred in excluding the testmony of defendants' witness, Emil H. Ovenberg, as follows:

"Q. Now, the 1936 agreement, then, resulted in an increase in the wage scale, did it not, to the employees? A. It did, yes.

Q. What was the movement of living conditions at the same time?

Mr. Howland: I object to that, if your Honor please, on the ground it is irrelevant and immaterial, and having nothing to do with the issues in this case.

The Court: Sustained.

Mr. Howard: If your Honor please, if I may have the privilege of this suggestion relative to the indictment, there is a charge here that there was some question of gift in the making of the scale. I think that we are entitled to all of the facts bearing on the question of how that scale was fixed."

(Assignment 26, R. 1481.)

This was a material circumstance bearing on the fixing of the wage scale and to show that the unions were not undertaking to impede competition from outside material in exchange for a wage increase. It bore directly on the reasons which did impel the unions to act.

(B-14) The Court erred in holding immaterial the fact that the unions obtained separate agreements upon the same terms from many cabinet shops not members of the employer association and in rejecting an offer to show that some forty other firms had 1938 contracts.

(Assignment No. 25 which is quoted in full, Appendix p. 88.)

This evidence was proper for at least two reasons. It was corroborative of the unions' position that their primary object in obtaining the so-called restrictive clauses of the agreement was the unionization of other shops in this locality and to meet a local situation.

It is also to be remembered that the indictment charged that the commercial fixture group, being the indicted cabinet manufacturers, did more than ninety per cent of the construction of cabinets and store fronts in the San Francisco Bay Area.

VI

CONCLUSION

The circumstsances under which the agreement was made, and the purpose and objectives of the Unions immunized their activity under the Clayton and Norris-LaGuardia Acts. Apart from such statutes their conduct also meets the test under the rule of reason. It therefore appears as a matter of law that these petitioners did not violate the Sherman Law.

The trial rulings and consequent convictions which inevitably followed can be upheld only if it is to be ruled that the agreements not to handle millwork and patterned lumber manufactured under less favorable working conditions were illegal *per se* if their enforcement included material in interstate commerce. This would read the Clayton and Norris-LaGuardia Acts out of the law. If these statutes have any application then whether the agreement resulted from a labor dispute, and the purposes, ends and objectives of the petitioners were at least questions of fact for the jury to be determined under proper instructions upon the law.

Respectfully submitted,

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APPENDIX

Sherman Act—Sec. 1: Trusts, etc., in restraint of trade illegal; penalty.—Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

(July 2, 1890, 26 Stat. 209, 15 U.S.C. Sec. 1.)

Clayton Act—Sec. 6: Antitrust laws not applicable to labor organizations.—The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

(Oct. 15, 1914, 38 Stat. 731, 15 U.S.C. Sec. 17.)

Clayton Act—Sec. 20: No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party

making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

(Oct. 15, 1914, 38 Stat. 738, 29 U.S.C. 52.)

Norris-LaGuardia Act—Sec. 102: Public policy of the United States. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

Sec. 104: Grounds for injunction limited. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

• • •

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 105: Same; combinations or conspiracies. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the Acts enumerated in section 4 of this Act.

Sec. 106: Member of union when not liable for acts of others. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or ratification of such acts after actual knowledge thereof.

Sec. 113: What constitutes labor dispute; participants; courts included. When used in this Act, and for the purposes of this Act:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

(Mar. 23, 1932, 47 Stat. 70, 29 U.S.C. Sec. 102 to 113.)

Assignment No. 41 (R. 1501)

The Court erred in excluding the testimony of defendants' witness, Kenneth Davis, concerning the organization of the lumber and sawmills in the States of Washington and Oregon by the A.F. of L. and C.I.O. during the years 1936 to 1940, inclusive, and in sustaining the objection to defendants' offer of proof through such witness, as follows:

"Mr. Carson, II. Q. Mr. Davis, are you acquainted with the facts concerning the organization of the lumber and sawmills located in Oregon and Washington during the year of 1933?

A. I am.

Mr. Zirpoli. I make the same objection, your Honor; immaterial and irrelevant.

The Court. Yes. The answer may go out. The objection is sustained.

Mr. Carson, II. Q. Are you acquainted with the facts surrounding the organization of the lumber and saw mills in Washington and Oregon in the year 1934?

A. I am.

Mr. Zirpoli. Same objection.

The Court. The answer will go out.

Mr. Zirpoli. Immaterial and irrelevant.

The Court. The objection is sustained.

Please don't answer until I have an opportunity, witness, to hear the objection, and an opportunity to rule.

Mr. Carson, II. Without repeating the question, but the same facts as to 1935, 1936, 1937, 1938, 1939 and 1940.

Mr. Zirpoli. I interpose the same objection, your Honor.

The Court. Sustained.

Mr. Carson, II. May it please the Court, we offer this testimony and this witness' testimony will show, in the year 1933 the mills in the Northwest, the lumber and saw-mills in the States of Washington and Oregon were independent organizations and not affiliated with either the AF of L or the CIO; that their wages at that time were from 19 to 28 cents per hour; that in the year 1934 those organizations under the NRA affiliated with the AF of L and received Federal charters, at which time their wages were advanced to the minimum wage of 40 cents per hour; that in the year 1935 they became affiliated with the United Brotherhood of Carpenters and received non-beneficial charters, at which time their minimum wages were increased to 50 cents per hour; that during the year 1940 they asked for recognition in the United Brotherhood of Carpenters under the classification of semi-beneficial locals; upon the recommendation of the president, general president Hutcheson, they were accepted into the organization and their charters were issued on a semi-beneficial class with the semi-beneficial benefits as set out in the constitution of the United Brotherhood of Carpenters and Joiners which is in evidence in this case; that in the year 1935 when they first affiliated with the United Brotherhood of Carpenters, they had approximately 1,900 members,

and by 1937 their membership had increased to 35,000 members; that in the year 1937 certain industrial warfare occurred in the States of Washington and Oregon, resulting in splitting up that union by the CIO in that territory, which left approximately 20,000 members in the United Brotherhood of Carpenters and approximately 15,000 went over to the CIO; that in the year 1940 these organizations were all back into the United Brotherhood of Carpenters and had increased their membership to 50,000; that the testimony of this witness will establish that the organization's efforts, that the contracts and efforts on the part of the locals and the District Council in the Bay Counties area was directly allied and a part of the organization's efforts of the United Brotherhood of Carpenters in the Northwest and is interallied with that organization and with the efforts to stop the inroads of the CIO.

Mr. Zirpoli: All of which testimony, I submit, is immaterial and irrelevant.

The Court. Do you wish to add anything?

Mr. Routzohn. I think it is quite material, your Honor, for us to show——

The Court: Please, Judge; I don't wish to hear any argument. The objection is sustained.

Mr. Routzohn. All right, sir.

The Court. I am sorry, but I don't wish to hear any argument."

Appendix

Assignment No. 42 (R. 1504)

The Court erred in sustaining plaintiff's objection and refusing to admit in evidence circular letter, Defendants' Exhibit 2-M for identification, and in sustaining objection to and striking out the testimony of the witness, Joseph F. Cambiano, as a foundation for admission of such exhibit, as follows:

"I attended the twenty-third General Convention of the United Brotherhood held in Lakeland, Florida, in December, 1935.

Q. I will ask you whether or not at that time any action was taken relative to the CIO activities in this territory in interfering with the United Brotherhood unions and endeavoring to organize the planing mills in this district.

Mr. Clark. Your Honor, we will object to any activities of the CIO, being outside any issue in this case.

The Court. Sustained.

Thereupon the jury was excused for the purpose of proffering certain documents in evidence.

The following proceedings occurred:

The Court. My suggestion is, you may make your offer, Judge Routzohn. I have read the document and I think I remember what it contains. You may make your offer for the record, and I will rule.

Mr. Routzohn. I desire, however, your Honor please, to lay the foundation for the introduction of the letter, unless there can be a stipulation at this time.

The Court. Well, you may do that if you wish.

Mr. Routzohn. Q. Mr. Cambiano, I hand you what purports to be a circular letter of date August 11, 1937, entitled Special Circular from General Execu-

tive Board sent by the General Executive Board of the United Brotherhood of Carpenters and Joiners of America, William L. Hutcheson, Chairman, and Frank Duffy, Secretary, and ask you state to the Court just what that paper is.

A. A circular sent out by the United Brotherhood of Carpenters——

Mr. Routzohn: No, no. It is a circular letter?

A. A letter to local unions throughout the United States and Canada.

Q. By 'Local unions' you refer to local unions, of course, of the United Brotherhood?

A. Local unions, district councils, State Councils and what not.

Q. You said you were at the convention at the time it was taken up?

A. That's right.

Q. At that time was there a dual organization known as the CIO, or Committee of Industrial Organizations, that was making any organization efforts and inroads on the locals?

A. There was.

Q. Of the United Brotherhood of Carpenters and Joiners of America?

A. There was.

Q. Was that true in this district as well as other districts throughout the Pacific Coast?

A. Yes.

Q. Including Washington and Oregon?

A. Yes.

Q. From 1936 on, has there been a constant and continuous organizing effort opposed to the organization efforts of the Brotherhood presented by the CIO organization?

A. There has been.

Mr. Clark. Your Honor, we will object and ask the answer go out.

The Court. The answer may go out. What is the objection?

Mr. Clark. Objected to as irrelevant and immaterial to any issue in this case.

The Court. Sustained.

Mr. Clark. I move to strike out the other answers. I thought he was laying a foundation to introduce this circular.

The Court. I thought so, too.

Mr. Clark. We move to strike it out.

Mr. Routzohn. That was my purpose. I was trying to make it doubly sure we were getting the proper foundation.

At this time, your Honor please, we wish to introduce into evidence—let us have that marked for identification—introduce in evidence this circular letter which has been marked for identification Defendants' Exhibit 2-M.

Mr. Clark. We object, your Honor, on the ground, first, that it doesn't meet the case in chief; second, that it is self-serving; and, third, it is immaterial, and irrelevant to any issue involved in this case.

The Court. Objection sustained.

The circular letter was marked 'Defendants' Exhibit 2-M for Identification'."

Appendix

The full substance of the evidence rejected is as follows:

"United Brotherhood of Carpenters and
Joiners of America

August 11, 1937.

Special Circular Form

General Executive Board

To the Officers and Members of All Local Unions and District, State and Provincial Councils of the United Brotherhood of Carpenters and Joiners of America.

Greetings:

Acting on instructions of our 23rd General Convention held in Lakeland, Florida, December, 1936, a subcommittee of the General Executive Board visited the lumber and saw mill operations in the Northwest. While there, meetings were held with representatives of our District Councils of the Western States, as well as operators who employ our members. The committee endeavored to get first hand information as to the past manner of handling organization of this branch of our industry, so as to secure the best possible results for men working in the woodworking industry as to working conditions and the proper relationship of men in our organization.

It found communistic and adverse influences boring from within to destroy the activities of the United Brotherhood and building up of a dual International Union of Woodworkers, opposed to the United Brotherhood, but before the sub-committee reported

its findings and recommendations to the General Executive Board the C.I.O. had already issued a charter, or certificate of affiliation to a dual organization called 'International Woodworkers of America.'

This dual organization is already trying to induce our local unions and members to secede from the United Brotherhood and to combat this dual movement it is necessary to notify all local unions, district, state and provincial councils that our members must not handle any lumber or millwork manufactured by any operator who employs C.I.O. or those who hold membership in an organization dual to our Brotherhood.

Do not be misled by newspaper articles that the entire lumber and sawmill industry has gone C.I.O. Just the opposite is the truth. We have thousands and thousands of loyal members in the Northwest who are battling for the United Brotherhood and will continue to do so, and it makes it absolutely necessary for all members to give them their support by refusing to handle materials coming from C.I.O. operations.

The C.I.O. has challenged us, and we must meet that challenge without hesitation. Therefore, you are instructed to appoint a committee to inform your employees and the lumber dealers that our members will refuse to handle any dual or C.I.O. products.

A list of operations using this class of labor will be sent from time to time as the situation develops, but appoint a committee at once so employers will be informed in plenty of time to protect themselves before placing orders for lumber or millwork. Kindly comply with the instruction at once and inform the General President of the names and addresses of the committee so proper information can be sent direct to them as well as to you, to secure quick action.

Let your watchword be 'No C.I.O. lumber or millwork in your district', and let them know you mean it.

Fraternally yours,

General Executive Board

William L. Hutcheson
Chairman.

Frank Duffy
Secretary."

Assignment No. 25 (R. 1474)

The Court erred in excluding the testimony of defendants' witness, W. P. Kelly, as follows:

"We obtained separate agreements from many of the cabinet shops who were not represented by Mr. Ennes.

Q. Yes. Have you those contracts?

A. I have no doubt that they are on file in the local unions, or in the district council.

Mr. Carson, II. They have been brought in for identification but they have not been separated.

The Court. Well, I think it is immaterial, anyhow; you are wasting time in producing them, gentlemen. If you wish to make a formal offer of them I will make a ruling now.

Mr. Routzohn. Q. Can you tell us about how many there were that you obtained, contracts from people other than those represented by Mr. Ennes?

Mr. Burdell. I object as immaterial and no foundation, and calls for his conclusions.

The Court. I think he said no.

The Witness. No, I did not say anything.

The Court. The objection is sustained.

Mr. Routzohn. We would like at this time, if your Honor please, to make a proffer of all the contracts that we brought in here at the instance of the Government.

The Court. Well, produce them; find them and produce them.

Mr. Routzohn. If I can prevail on the clerk, here, to do that, your Honor, please.

The Court. Well, I think you ought to assist the clerk in doing that if you know what they are. Make the offer some other time.

Mr. Routzohn. All right, sir. We can do that before this witness leaves.

Q. Is that also true in the 1936 contract, that you obtained contracts from others than those represented by Mr. Ennes?

A. Yes.

Mr. Burdell. I ask the answer be stricken and I will also interpose the same objection.

The Court. The answer may go out. Objection sustained.

Mr. Routzohn. Q. The same question as to the mill owners represented by Mr. Edwards and Mr. Gaetjen, that is, the other mill owners, whoever they were, over here on this side of the Bay, did you obtain contracts with other mill owners that were not represented by them?

Mr. Burdell. The same objection.

The Court. Sustained.

Mr. Routzohn. Now, if your Honor please, at some other time we would like to make that offer.

The Court. Very well. • • •

Q. I show you here some exhibits that have been produced, I am not going to introduce the exhibits, your Honor, but I would ask Mr. Kelly if he would indicate the firms that were unionized in 1938, with contracts identical with the ones here in evidence. The firms are on the top of each one of these.

Mr. Burdell. Do you mind if I look at them a minute?

Mr. Faulkner. No.

A. Atlas Stair-building Company, that was one signed August 15, 1938.

Q. Signed what date?

A. August 15, 1938.

Mr. Burdell. Do you have a list of those?

Mr. Faulkner. They have been in and out of our possession, but they came in here at the trial.

The Court. Why don't you make a list of them and you can save time.

Mr. Faulkner. Suppose I read them off. There are really not very many.

The Court. Very well, read off the names.

Mr. Burdell. I am going to object to it, because I do not see any materiality, and I do not see any foundation laid.

Mr. Faulkner. These came out of the union's possession. They are original contracts, aren't they, Mr. Kelly?

Mr. Burdell. I take it these will show these companies were unionized in 1938, but is there anything to show they were not unionized before?

Mr. Faulkner. They may have had a contract before.

Mr. Routzohn. Some of them did not get in until 1940.

The Court. I cannot see that they are material. I asked you before to make a list of them and you can make your offer and I will rule upon it.

Mr. Faulkner. I will read the names off, it will only take a short time. * * *

Thereupon, the names of some forty firms with 1938 contracts were read.

The Court. Are any of those firms whose names you have read corporations, partnerships, or individuals, defendants in this case now on trial?

Mr. Burdell. One is, your Honor, possibly two that I know of. The Brannan Street Planing Mill and Eureka Sash, Door & Molding Company.

The Witness. That is a different Eureka mill.

The Court. Those are separate contracts made by the unions with persons who are in no way involved in the trial now before the Court?

Mr. Faulkner. Yes, except that they signed the identical contract.

The Court. Yes.

Mr. Faulkner. And the testimony is offered for the purpose of showing that at the time, in conformity with the position taken by the respective sides, that paragraph 8 of the Arbitration Award, paragraph 2 of the Agreement, was to provide a condition of unionization of plants in this area. In other words, there was an attempt to unionize, and the only distinction between the contracts they ultimately entered into and the contract actually entered into, I would like to read into the record, it is only a line.

The Court. Read it.

Mr. Faulkner. 'Agreement for the purpose of promoting the mutual interest of the parties signatory hereto between (blank),' that is, between the various people whose names I had read 'and the Bay Counties District Council of Carpenters as follows:

The wages, hours and working conditions of the Cabinet Makers, Carpenters and Millmen employed by the different firms by whom the agreement was signed—will be as stipulated in the agreements between the District Council of Carpenters, Millmen's Unions No. 42 and 550 and the Lumber Products Association, Inc. and the Cabinet Manufacturers Institute, Inc., Northern Division, which is as follows'—and then the Exhibit 132—

The Court. Are you going to read any more of that?

Mr. Faulkner. No. In other words, Exhibit 132 is mimeographed and became a part of every agreement with these people.

Mr. Burdell. I desire to move to strike everything that Mr. Faulkner has read, because it does not prove what he wants to prove, it is immaterial.

The Court. I think it is immaterial, it may go but. Do I understand you are going to offer these in evidence?

Mr. Faulkner. No, I have completed my proof, I think it is relevant in this case. The Government says that paragraph operated to provide for a certain situation, and here are constant attempts to unionize other people. The position we have taken is that that paragraph had to do with the local condition where competitors of these people would be paying a different rate, and as long as that competition existed it is evidence by itself that these people were not unionized. I think it is within the issues of the case.

The Court. Have you any motion that you wish to make?

Mr. Burdell. Yes, I move to strike the whole thing on the ground it is immaterial, irrelevant, and incompetent, and no foundation laid, assuming facts in evidence and not within the issues of this case.

The Court. The motion is granted. • • •

Mr. Faulkner. Your Honor, at the time of the noon recess, Mr. Burdell had made an objection which your Honor sustained. In connection with that objection, one of the grounds stated was that a proper foundation had not been laid in identifying these papers. I don't want to pursue the matter any further in the light of the Court's ruling, but that would be a sound objection—in other words, I had not completed the identification of the documents. If Mr. Burdell will withdraw that and the record will clearly show your Honor's ruling was based on the materiality, I won't have to devote any more time to it. I think that was your Honor's position, was it not?

The Court. Yes.

Mr. Faulkner. Will you withdraw that ground of your objection?

Mr. Burdell. Well, my objection is based on the fact it is not material and also that no foundation as to materiality has been laid.

Mr. Faulkner. Well, you did not mean that was not any foundation that these were original agreements that were entered into on the day they bore date?

Mr. Burdell. No, that is not part of my objection.

Mr. Faulkner. I think that clears it up.

The Court. Yes."